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Supreme Court, U.S.
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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAT S. HOLLOWAY,

Petitioner,

v.

JUDGE DEE BROWN WALKER, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a state trial court has conspired with a litigant to deprive the opposing party of his property in a sham trial, does the availability of a postdeprivation appeal render the Due Process Clause inapplicable and 42 U.S.C. § 1983 unavailable?

2. In declining to make a federal case of every tort by a state employee, has this Court *sub silentio* overruled a century of precedents holding that official abuse of state authority may violate due process whether or not the state's own system of remedies is constitutionally adequate?

PARTIES TO THE PROCEEDING

The abbreviated caption of this case omits several parties named as defendants in Petitioner Holloway's complaint who are Respondents here: Jane H. Browning, Michael G. Starnes, Catherine Agnes Land Starnes, Kathryn Louise Browning Cook, Averille Adams Browning, William Webb Browning III, Winifred Fallon Browning, Robert Holland Browning and the Estate of William W. Browning, Jr. (the "Browning Interests"); G.H. Kelsoe, Jr. and R. Jack Ayres, Jr. (attorneys for the Browning Interests); John Wright (the receiver appointed by Judge Walker), Whitley R. Sessions, J.R. Hurt, Fairway Land Co., Fayette Oil Co., AMCAP Petroleum Associates-1977, AMCAP Petroleum Associates-1979B, American Hawk Oil Co., American Falcon Oil Co., American Eagle Oil Co., American Heron Oil Co., American Wren Oil Co., American Raven Oil Co., Harper Oil Co., Jeffrey Weiss, Donald Ginsberg, and American Petroleum Partners.

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OPINIONS BELOW

This petition seeks review of a decision of the United States Court of Appeals for the Fifth Circuit, which is reported at 784 F.2d 1287 and reprinted as Appendix A.[1] The Fifth Circuit's opinion and order denying rehearing, in which the court below addressed the circuit conflicts, is unreported and reprinted as Appendix F. The memorandum opinions of the United

[1] References to the appendices will be styled "A ___."

States District Court for the Northern District of Texas, Dallas Division (Sanders, J.), are unreported and reprinted as Appendices B, C, and D. The decision of the Fifth Circuit holding Respondent Walker absolutely immune from liability under 42 U.S.C. § 1983 is reported at 765 F.2d 517 (*cert. denied,* 106 S.Ct. 605) and reprinted as Appendix E. The judgment sought to be reviewed is reprinted as Appendix G.

JURISDICTION

The decision and judgment of the Court of Appeals were entered on March 19, 1986. A timely petition for rehearing was denied on May 30, 1986, and the mandate issued on June 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunties secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

STATEMENT OF THE CASE

The relevant facts are simple and, since this petition arises from the dismissal of a complaint, they are also undisputed.[1] Petitioner Pat Holloway and his oil companies (Humble Exploration Co., Inc., *et al.*) were defendants in a Texas state court lawsuit seeking damages and a constructive trust. The plaintiffs, their attorneys, and others conspired with the presiding judge, Judge Dee Brown Walker, "to rig the outcome of the trial." (A25). Judge Walker "abused his office by imposing a receivership on Humble, appointing an incompetent administrator, and largely wrecking the corporation in accordance with the aims of the conspiracy." (A44).[2] The United States Court of Appeals for the Fifth Circuit "treat[ed] the complaint as alleging both bribery and conspiracy." (A47). The conspiracy

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[1] The courts below did "not go outside the pleadings . . . [and] accept[ed] all well pleaded facts as true and view[ed] them in the light most favorable to the plaintiff." (A44).

[2] The complaint specifically alleges that Judge Walker arranged to have the suit against Holloway "brought before his court contrary to the usual procedure of assigning cases, . . . that he imposed receiverships on Humble's and Holloway's assets, defied a mandamus order of the Texas Court of Appeals to refrain from interfering in Humble's business, appointed an incompetent receiver for Humble, dismissed many Humble personnel, posted [armed] guards at Humble's headquarters to seize the building, and, in a hotel near the courthouse, conducted meetings regarding Humble's business, all in furtherance of the conspiracy." (A47).

was furthered by "regular *ex parte* meetings" during the course of the trial between Judge Walker and counsel for the state court plaintiffs — "to which [Petitioner's] counsel were not invited" (A34) — including a meeting at which Judge Walker "announced the decision to submit jury issues on 'our' theory of the case." (A35).[3] When the state court jury nevertheless returned a verdict in favor of Holloway and his companies,[4] Judge Walker, in furtherance of the conspiracy, took the case from the jury and entered judgment *non obstante verdicto* against Holloway and his companies for $72 million in damages,[5] and placed all of Holloway's and his companies' assets — including Holloway's residence, his inheritance, and many of his personal effects — in a constructive trust for the plaintiffs.[6]

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[3] Before the case went to the jury, Judge Walker retained attorney Robert Hughes to represent him in settlement negotiations then proceeding between the parties. (Hughes was paid by Judge Walker out of the funds of Petitioner's oil companies that the judge had placed in receivership.) Based on his attendance at these *ex parte* meetings, Hughes concluded "that the Court and plaintiff's counsel . . . were in one accord and that real settlement negotiations were a sham." Affidavit of Robert Hughes, First Circuit Record Excerpts Exh. P.

[4] Specifically, the jury found that Holloway had *not* agreed to hold the shares of Humble Exploration Co. issued in his name for the use and benefit of the Browning Interests (the plaintiffs in the state action) and that Holloway had *not* defrauded the Browning Interests. The jury further concluded that the Browning Interests were entitled to no damages whatsoever. Special Jury Issues Nos. 1, 5, 83.

[5] The statement in the opinion of the court below to the effect that exemplary damages were awarded against Petitioner is incorrect. (A4). The amended judgment filed by Judge Walker on November 11, 1982, awarded $72 million in compensatory damages only.

[6] The Texas Court of Appeals vacated an earlier, pre-judgment receivership as a "judicial interference in the affairs of the parties in litigation," *Humble Exploration Company, Inc.* v. *Fairway Land Company*, 641 S.W.2d 934, 944 (Texas Ct. App. — Dallas 1982), but Judge Walker maintained that receivership in direct defiance of a writ of prohibition issued by that court. *Id.* at 946; A60-61. That writ has no application to the constructive trust imposed by Judge Walker as part of the judgment.

Holloway appealed the judgment to a Texas appellate court and filed this action under 42 U.S.C. § 1983 in federal district court seeking damages and injunctive relief against Judge Walker, the state court plaintiffs, their attorneys, and the others in conspiracy with them.[7] The district court ruled "that a genuine issue of material fact existed as to whether defendants had violated [Holloway's right to a fair trial] through a conspiracy with [Judge] Walker." (A7; A35, A41).[8]

Relying on its decision in *Sparks* v. *Duval Ranch Co.*, 604 F.2d 976 (5th Cir. 1979) (en banc), *aff'd sub nom. Dennis* v. *Sparks*, 449 U.S. 24 (1980) (A50), the Fifth Circuit dismissed the claims against Judge Walker on the basis of judicial immunity, because "[a]ll of the harms Judge Walker is claimed to have caused are alleged to have been perpetrated by him through judicial acts not performed in the clear absence of all

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[7] The notice of appeal in Texas was filed on November 24, 1982. The federal civil rights complaint was filed on November 18, 1982.

[8] A motion for summary judgment, based on the supposed insufficiency of evidence of involvement in the conspiracy, was granted by the district court with regard to the Browning Interests. (A8). This ruling was appealed, but the Fifth Circuit never reached the issue, since it upheld dismissal of the entire complaint for failure to allege a constitutional violation. (A16 n.3). But the Fifth Circuit would have to reach that issue upon remand were this Court to reverse the judgment below. The Brownings are therefore included among the Respondents here.

In any event, fairness to all the parties requires that the Brownings be allowed to participate in these proceedings. As a result of the trial conducted by Judge Walker, the Brownings were awarded damages against Petitioner and were also made the beneficial owners of the assets of which Petitioner was deprived. Any eventual recovery of those assets by Petitioner, as part of the equitable relief he seeks herein under § 1983, would come at the expense of the Browning Interests. Even assuming *arguendo* that the Brownings did not directly participate in the conspiracy alleged here, nevertheless they cannot be analogized to third-party bona fide purchasers who received Holloway's assets in ignorance of the uncertainty as to their rightful ownership.

jurisdiction." (A53).[9] The Fifth Circuit specifically held that Judge Walker acted exclusively "in his judicial capacity" (A57), and deemed it "irrelevant" that Judge Walker was alleged to have "misuse[d] . . . his court's power to issue injunctions and place the parties before him into receivership." (A55). Even if those acts were taken "pursuant to a bribe or a conspiracy[,] they remain 'judicial acts.'" (A55).[10]

The district court subsequently granted the defendants' motions for summary judgment on the basis of this Court's opinions in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and *Hudson* v. *Palmer*, 468 U.S. 517 (1984), holding that "the alleged conspiracy by the state court judge to deprive [Petitioner and his companies] of their property constituted a random and unauthorized act by a state employee." (A9-10).[11]

On appeal, the Fifth Circuit likewise applied *Parratt* and *Hudson* to hold that Holloway had failed to state any violation of his substantive or procedural constitutional rights. The court below reasoned that the state action causing the deprivation of Holloway's due process rights, including his right to a fair trial before an impartial judge, was incomplete in view of his theoretical opportunity to appeal under state law. (A12).[12] Even

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[9] The Texas Court of Appeals' writ of prohibition "did not purport to determine that Walker's court was without general subject matter jurisdiction," but merely "that he was acting in excess of that jurisdiction in continuing to conduct proceedings in the face of an effective order to desist." (A54; *see also* A55 n.4).

[10] This Court declined to review the Fifth Circuit's judicial immunity ruling. 106 S.Ct. 605 (1985) (White, J., would have granted certiorari).

[11] The full account of the procedural complexity of this protracted litigation, while of obvious interest to the parties themselves, is not relevant to the question presented by this petition. A more detailed account of the history of this case and the related actions can be found in the opinion below (A2-8) and in *Browning* v. *Navarro*, 743 F.2d 1069, 1071-73 (5th Cir. 1984).

[12] The word "theoretical" must be stressed inasmuch as the Texas appellate system was in fact withheld from Holloway. When the state court plaintiffs brought suit in federal court to enforce their state court judgment, Holloway

though, by virtue of the Fifth Circuit's own holding, it was *res judicata* that Judge Walker had acted exclusively in "his judicial capacity" (A57); that "the precise act complained of was a normal judicial function" (A55; A57); and that Judge Walker was "empowered to conduct proceedings of the sort he conducted" (A54), the court below nonetheless ruled that any property deprivation suffered by Holloway had not occurred pursuant to "an established state procedure" (A13) but pursuant to "a random and unauthorized act of a state employee." (A13). Since the state cannot know in advance which of its judges will succumb to a bribe, the Fifth Circuit deemed a conspiracy such as that alleged here to be "random" by definition. (A61). As the court below saw the matter, there can be no constitutional violation where "a state system as a whole provides due process of law," and where the most that can be said is that a particular individual clothed with the judicial authority of the state abused his office. (A65). For the Fifth Circuit, a § 1983 plaintiff cannot state a due process violation by alleging an "affirmative abuse of power" even in the course of a "*deliberate* decision of governmental officials to deprive [him] of life, liberty, or property," *Daniels* v. *Williams*, 106 S.Ct. 662, 665 (1986) (original emphasis), but can do so only by alleging that the corruption or abuse of power by which

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raised as a defense the argument that the state trial before Judge Walker had violated the terms of a prior bankruptcy court order remanding the case for trial in the Texas courts. On appeal from that state trial court judgment, the Texas Court of Appeals concluded that Holloway's decision to raise that argument defensively in federal court rather than before Judge Walker was sufficient, under the Texas doctrine of election of remedies, to bar him from further relief under state law. Holloway's appeal was accordingly dismissed. *Humble Exploration Co.* v. *Browning*, 677 S.W.2d 111 (Tex. Civ. App. — Dallas 1984, writ ref'd n.r.e.), *cert. denied*, 106 S.Ct. 1376 (1986). Thus, Petitioner was denied access to the Texas appellate courts because he was deemed to have "elected a federal remedy" when he attacked the state trial judgment *by way of a defense* in a federal court into which, as a would-be state appellant, he had been involuntarily haled. *See* n.31 *infra*.

he has been victimized "'represent[s] official state policy.'" (A12).

The Fifth Circuit acknowledged, as it had to on this record, that this case is "factually similar" to *Dennis* v. *Sparks*, 449 U.S. 24 (1980) (A65),[13] a case which the court of appeals had previously found controlling on the immunity issue. (A50-51). Yet the court below nonetheless deemed itself free to ignore the unanimous holding of *Dennis* that a § 1983 suit lies against those who conspire with a state judge. The Fifth Circuit dismissed *Dennis* as "inapposite" because it "antedated the *Parratt/Hudson* rule entirely and discussed only the issue of whether private parties who conspired with an immune state court judge had acted 'under color of state law.'" (A65). The court of appeals acknowledged but declined to follow the decisions of other circuits reading the *Parratt/Hudson* line in a decisively narrower fashion. (A60-63).[14]

REASONS FOR GRANTING THE WRIT

Eight days before it handed down the decision in *Hudson* v. *Palmer*, this Court unanimously reaffirmed its unanimous decision in *Dennis* v. *Sparks*. *See Tower* v. *Glover*, 467 U.S. 914, 920 (1984). Yet the Fifth Circuit Court of Appeals now takes it upon itself to ignore the import of *Dennis* by treating *Parratt* and *Hudson* not as limiting the extravagant federalization of tort law, but as providing a new starting point for analysis about § 1983's core application to the official abuse of state power.

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[13] In truth, the cases are virtually indistinguishable. *See* pp. 9-10 *infra*.

[14] *See Patterson* v. *Coughlin*, 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 879 (1986), and *Bretz* v. *Kelman*, 773 F.2d 1026 (9th Cir. 1985) (en banc), discussed in Part III *infra*.

Dennis should not be so cavalierly brushed aside — especially given the remarkable similarity between its facts and those of the case at hand. The federal plaintiffs in *Dennis* filed their § 1983 complaint against private parties who had allegedly conspired with a Texas trial juge to injure plaintiffs' property interests in certain oil leases by corruptly issuing an injunction. 449 U.S. at 25-26. In *Dennis*, as here, the state provided an appellate remedy; indeed in *Dennis*, the corruptly issued injunction had been "dissolved by an appellate court as having been illegally issued" before the § 1983 action was filed. *Id.* at 25. In *Dennis*, as here, the state trial judge was immune from suit under § 1983 because, as here, "the challenged conduct [was] an official judicial act." *Id.* at 29. It followed that the "[p]rivate parties who corruptly conspire[d] with [the] judge [were] . . . acting under color of state law," *id.*, and the Court in *Dennis* took it for granted that they could accordingly be sued under § 1983 for violating due process, notwithstanding the availability of state appellate relief from the corrupt trial court decree. In so holding, the Court relied upon the profound "benefits of providing [an independent federal] remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons." *Id.* at 32.

It is indeed true that *Dennis* discussed "only" the "under color of state law" issue, as the court below observed. But in holding that the private co-conspirators of the state trial judge acted under color of state law, and did so notwithstanding the availability of state appellate review, this Court implicitly recognized that the property loss worked by the conspiracy necessarily constituted a completed deprivation *by the state* without due process of law. Otherwise the Court would have been engaged in a pointless academic exercise. For there would have been no point in finding the private co-conspirators to have acted under color of state law if, in any event, no § 1983

action would lie inasmuch as the state appeals court had already prevented any deprivation from ripening into a due process violation. The case at hand must therefore be decided "in the shadow" of *Dennis*. *Cf. Mitchum* v. *Foster*, 407 U.S. 225, 231 (1972).

The Fifth Circuit's conclusion that the Due Process Clause is satisfied by the availability of a postdeprivation appeal whenever a state trial court has conspired with litigants to deprive someone of his property not only is at odds with *Dennis*, but is wholly unsupported by the *Parratt/Hudson* line relied on by the court below. *Parratt* and *Hudson* hold only that no predeprivation hearing is constitutionally required where circumstances make it impossible or impracticable to provide one. *See Parratt*, 451 U.S. at 541; *Hudson*, 468 U.S. at 531-33.[15] Since a state cannot predict when a mail clerk might inadvertently lose a prisoner's hobby kit, nor forecast and control "in advance the random and unauthorized intentional conduct of its employees," it is an unremarkable conclusion that "predeprivation procedures are simply 'impracticable' " in such circumstances and that deprivation without those procedures does not offend the Constitution. *Hudson*, 468 U.S. at 553.[16] Indeed, in both *Parratt* and *Hudson* this Court

[15] While the Court may want to elaborate on the "random and unauthorized act" language which has caused confusion among the circuits, *compare Holloway* (A61) ("From the point of view of the state, a conspiracy among its employees can indeed be a random act") with *Bretz* v. *Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) ("By definition, a conspiracy . . . cannot be a random act"), it is crucial to emphasize that no particular view of that phrase need be taken to avoid the sweeping implications given *Parratt* and *Hudson* by the Fifth Circuit. A conspiracy between private individuals and a presiding judge to subvert a state trial proceeding and to deprive other individuals of their property goes beyond any conceivable elaboration of "random and unauthorized" as those terms are used in *Parratt* and *Hudson*. *See* n.24.

[16] In this sense, as the Court itself expressly recognized, *Parratt* and *Hudson* are consistent with the line of cases such as *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (upholding state power to seize and destroy

expressly distinguished cases in which the "loss of property is occasioned by . . . an established state procedure," *Hudson*, 468 U.S. at 532; *see also Parratt*, 451 U.S. at 537-38, such as judicial trust settlement, driver's license revocation, prejudgment replevin, *id.*, or, as in this case, a trial.

Parratt and *Hudson*, like the Court's earlier decisions in *Paul* v. *Davis*, 424 U.S. 693 (1976), and *Ingraham* v. *Wright*, 430 U.S. 651 (1977), and like the more recent decisions in *Daniels* v. *Williams*, 106 S.Ct. 662 (1986), and *Davidson* v. *Cannon*, 106 S.Ct. 673 (1986), embody the Court's determination that the Fourteenth Amendment "does not purpose to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels*, 106 S.Ct. at 666. Those cases are uniformly distinguished from the case at hand by this Court's consistent policy of "not 'open[ing] the federal courts to lawsuits where there has been no affirmative abuse of power.'" *Daniels*, 106 S.Ct. at 664-65 (*quoting Parratt*, 451 U.S. at 549 (Powell, J., concurring in result)). Section 1983 "was enacted to deter real *abuses* by state officials in the exercise of governmental powers," *Parratt*, 451 U.S. at 549 (Powell, J., concurring in result) (original emphasis). It could hardly be more obvious that in this case, as the Fifth Circuit itself stated, "[t]he complaint alleges that [Judge] Walker and the other defendants conspired to seize control of Humble through the *abuse of Walker's judicial office*." (A47) (emphasis added).

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unwholesome food without a prior hearing), and *Fahey* v. *Mallonee*, 332 U.S. 245 (1947) (permitting immediate seizure of property without prior hearing when competence of a bank's management is in great doubt). "These cases recognize that either the necessity of quick action by the state or the impracticability of providing any meaningful predeprivation process, when coupled with the availability of some meaningful [postdeprivation process] can satisfy the requirements of procedural due process." *Parratt*, 451 U.S. at 539; *see also Hudson*, 468 U.S. at 531-32.

It is a far cry from the proposition that one should not make a federal case out of every tort committed by someone on a state payroll to the announcement that the Fourteenth Amendment has nothing to say about conspiratorial subversion of a state's *trial* machinery so long as the state's *appellate* system remains open and uncorrupted. It is inconceivable that this Court, which took pains to distinguish genuine abuses from garden-variety torts, would have embraced so radical a view without expressly saying so — and without, at some length, saying why. After all, this Court has unanimously acknowledged that § 1983 was enacted in part to enforce the Fourteenth Amendment against state courts because those tribunals, which "were being used to harass and injure individuals," were sometimes themselves "in league with those who were bent upon abrogation of federally protected rights." *Mitchum, supra,* 407 U.S. at 240. Were the *Hudson* extension of *Parratt* to have gone so far as to repudiate this understanding of the Amendment, it is unthinkable that it could have been unanimous. In any event, for a circuit court to attribute so extreme a holding to decisions that by their own terms demand a narrower reading — and have been given just that by other circuits — is singularly inappropriate and surely calls for plenary review by this Court.

I. THE JUDGMENT BELOW IGNORES A CENTURY OF PRECEDENT HOLDING THAT ABUSE OF STATE POWER MAY VIOLATE THE FOURTEENTH AMENDMENT EVEN WHERE THE STATE PROVIDES ADEQUATE PROCEDURES FOR REVIEW AND REDRESS.

The court of appeals held that "*Parratt/Hudson* establishes that no federal constitutional due process violation" can flow

from the conspiratorial subversion of a state trial so long as some means of appellate redress remains available. (A63). The Constitution, according to the Fifth Circuit, requires only that "a state system *as a whole* provide[ ] due process of law." (A65) (emphasis added). The court of appeals evidently believes that the Fourteenth Amendment speaks not to state actors but solely to the states as states, and that a state need not answer in federal court for the acts of its agents unless and until it has embraced and endorsed their conduct. Whatever the merits of this view of the Fourteenth Amendment as an original matter, it is a view that this Court decisively repudiated more than a century ago.

In *Ex parte Virginia*, 100 U.S. 339, 347 (1880), this Court declared that the prohibitions of the Fourteenth Amendment operate "not upon the abstract thing denominated a State, but upon the persons who are the agents of the state," for a "State acts by its legislative, its executive, or its judicial authorities. It can act in no other way." At least since *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U.S. 278 (1913), the "settled construction of the Amendment [has been] that it presupposes the possibility of an abuse by a state officer or representative." *Id.* at 287.[17] In that watershed case, the Court emphatically rejected the claim that acts in violation of state law were not cognizable as violations of the Fourteenth Amendment "until by the final action of a state court of last resort the act of a state officer has been declared rightful and to be the lawful act of the State as a governmental entity." *Id.* at

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[17] In his opinion for the Court in *Home Telephone*, Chief Justice White exploded the assumption "that the Amendment virtually contemplates alone wrongs authorized by a State." 227 U.S. at 288. Indeed, abuse of public power in contravention of both the Fourteenth Amendment and state law "was more normally to be contemplated" than the possibility "that States acting in their governmental capacity in a complete sense may do acts which conflict with [the Amendment's] provisions." *Id.*

285.[18] Thus, "where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is *irrelevant*." *Id.* at 287 (emphasis added).

With all due respect, the Fifth Circuit's use of the *Parratt/Hudson* "random and unauthorized" conduct standard to reach a contrary conclusion borders on the absurd.[19] In pointing out that Petitioner did not allege "that Judge Walker's conspiratorial acts 'represented official policy' " (A12), the court below did little to advance its argument.[20] For the question is not whether Judge Walker was "authorized" to take a bribe or to engage in a conspiracy, but whether the harms he visited upon Petitioner were brought about through his conduct of a trial, his entry of an award of damages, his imposition of receiverships and constructive trusts, and his rendering of a judgment n.o.v. — in short, through his exercise in this case

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[18] This proposition, the Court observed, was a "departure from the substantially unanimous view which has prevailed from the beginning." 227 U.S. at 284.

[19] The court below sidestepped the authority issue by taking the "random *and* unauthorized" conduct standard of *Parratt/Hudson* and watering it down to a "random *or* unauthorized" test (A63), thereby overtaxing the language and making the individual words of this Court's shorthand phrase do far more analytical work than this Court could ever have intended.

[20] One would hope that the arbitrary and abusive exercise of government power has *never* been "official policy" in this nation. But that surely cannot be a prerequisite for finding a violation of the Constitution: "history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, was 'intended to secure the individual from the arbitrary exercise of the powers of government.' " *Daniels* v. *Williams*, 106 S.Ct. at 665. And this Court has long recognized that it is "more normally to be contemplated that state powers might be abused by those who possess[ ] them", than that "States acting in their governmental capacity in a complete sense may do acts which conflict with [the Fourteenth Amendment's] provisions." *Home Telephone*, 227 U.S. at 288.

of the judicial authority with which the State of Texas clothed him.[21] The Fifth Circuit itself answered this question in the affirmative — and thereby foreclosed the inconsistent holding below — when it held Judge Walker to be absolutely immune from damages liability under § 1983 for the specific conduct at issue in this case.[22] For under *Dennis* v. *Sparks*, a judge's "immunity is dependent upon the challenged conduct being an official judicial act within his statutory jurisdiction." 449 U.S. at 29.

Although, on a first reading, the opinion below is as perplexing as it is maddening, little further reflection is needed to discover the place at which the Fifth Circuit's reasoning jumped the rails: the court simply began its analysis at the wrong starting point. Viewing *Parratt* as the background law, the court could see only *Parratt*, *Hudson* and the *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), exception to *Parratt* and *Hudson*.[23] The opinion below proceeds as though there had been no Civil War, no Civil Rights Act, and no line of landmark decisions from *Ex parte Virginia* to *Monroe* v. *Pape*,

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[21] In *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), "the relevant action of the prison officials . . . [was] their deliberate decision to deprive the inmate of good-time credit, not their hypothetically negligent failure to accord him the procedural protections of the Due Process Clause." *Daniels* v. *Williams*, 106 S.Ct. at 666. Likewise, the relevant action in this case is Judge Walker's deliberate decision to deprive Petitioners of their property by a combination of receivership orders, constructive trusts, and damage awards — judicial acts undeniably authorized by the state — not his alleged failure, in furtherance of a conspiracy with the Respondents, to provide Petitioners due process.

[22] "All of the harms Judge Walker is claimed to have caused are alleged to have been perpetrated by him through judicial acts not performed in the clear absence of all jurisdiction; accordingly, Judge Walker's immunity bars a damages claim against him for these harms." (A53).

[23] The *Logan* exception states that "postdeprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action." *Hudson*, 468 U.S. at 532.

365 U.S. 167 (1961). This is not merely a case of being unable to see the forest for the trees, but of overlooking an entire century of stately growth by concentrating solely on the most recent saplings.

The Fifth Circuit found that this case did not fit into the *Logan* exception. In fairness to the court below, the point is debatable.[24] But *Parratt* is *not* the background law. It is a narrow exception to the fundamental rule enunciated in *Home Telephone* that, "although the act of the [state officer] was wrongful from the point of view of the state constitution or law, it was nevertheless an act of a state officer within the intendment of the Fourteenth Amendment," 227 U.S. at 292, even though the State's remedial procedures may stand ready to provide redress.

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[24] If limited to its facts, *Logan* may indeed be applicable only to deprivations wrought by "the terms of [a state] statute." *Hudson* 468 U.S. at 532 n.13. But at least one circuit, in square conflict with the Fifth, has read *Logan* more generously, to include a "challenge to a direct abuse of the state process itself." *See Bretz* v. *Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985). And *Logan* itself summarized the issue presented by its facts as whether due process is denied when "a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure." 455 U.S. at 424. That language seems to fit the situation here — where Juge Walker, because of the conspiracy that was obviously beyond Petitioner's control, failed to provide the fair trial mandated by Texas law. Moreover, to use the Court's language in *Hudson*, the deprivation in the case at hand was undeniably "caused by conduct pursuant to established state procedure" — a trial and ensuing judicial decrees — "rather than random and unauthorized action." 468 U.S. at 532. After all, Judge Walker is not alleged to have crept into Petitioner Holloway's home and absconded with his stock certificates — surely "unauthorized action" — nor even to have to left the bench in the middle of trial to "shake down" Holloway's brief case and "destroy[ ] . . . legal materials [and] letters . . . as a means of harassment," *Hudson* v. *Palmer*, No. 82-1630, App. 7-8, but to have conspired with Respondents to effect the deprivation of Holloway's assets through abuse of his judicial office and manipulation of established trial procedures.

II. THE DECISION BELOW TRIVIALIZES THE RIGHT TO A FAIR TRIAL AND CONTRADICTS THIS COURT'S RECENT HOLDING IN *AETNA LIFE INSURANCE COMPANY V. LAVOIE*.

The Fifth Circuit's holding that federal law secures no right to a neutral adjudication as such, but only to a constitutionally adequate "procedure for choosing judges" (A11) and to a "post-deprivation remedy through the right of appeal" where an "individual judge . . . act[s] arbitrarily or corruptly" (A12), trivializes over half a century of precedent on the meaning of the fundamental right to a fair trial before an unbiased judge. *See, e.g., Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *In re Murchison*, 349 U.S. 133 (1955); *Tumey* v. *Ohio*, 273 U.S. 510 (1927). For under the Due Process Clause, no judge "can be . . . permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. at 136. The test is whether a given situation is one "which might lead [the judge] not to hold the balance nice, clear and true" between the parties. *Tumey* v. *Ohio*, 273 U.S. at 532. A corrupted "trial court procedure [may not] be deemed constitutionally acceptable simply because the State eventually offers [an aggrieved party] an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." *Ward* v. *Village of Monroeville*, 409 U.S. at 61-62.

The allegations of bribery and conspiracy in Petitioner's complaint present an even more obvious due process violation than any this Court considered in *Tumey* or its progeny. For they augur the prospect that the judge did not merely fail "to hold the balance nice, clear and true," but that he in fact dispensed with the scales of justice altogether by making his

judgment *before* the trial even began.[25] Thus, the threat to due process here is *not* that Judge Walker, being biased, might have been predisposed during trial to listen more attentively to Respondents than to Petitioner, but that he was just not listening *at all* because he had already decided to rule against Petitioner — with or without the cooperation of the jury.

The decision below cannot be reconciled with this Court's unanimous holding just last Term that the very participation of even a merely biased judge violates the Fourteenth Amendment. *Aetna Life Insurance Co.* v. *Lavoie*, 106 S.Ct. 1580 (1986). In *Aetna*, where Justice Embry of the Alabama Supreme Court participated in a decision that would have affected the prospects of two pending lawsuits to which the Justice was a party, the presumed "constitutional adequacy" (A12) of Alabama's judicial selection procedures did not deter a single member of this Court from embracing the proposition that Justice Embry's "participation in this case violated appellant's due process rights as explicated in *Tumey*, *Murchison*, and *Ward*." *Id.* at 1587. It mattered not that a further "postdeprivation remedy" was obviously available on petition for rehearing. It was plain that "[t]he violation of the Due Process Clause occurred *when Justice Embry sat on this case*," *id.* at 1591 (Blackmun, J., joined by Marshall, J., concurring in the judgment) (emphasis added); *see id.* at 1587 (Burger, C.J., for the Court); *id.* at 1590 (Brennan, J., concurring), not when the motion for rehearing was denied.[26]

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[25] Judge Walker placed Humble Exploration Co. into receivership at the beginning of the hearing that he convened on this issue — *before* Petitioner even had a chance to cross-examine the other side's *first witness*. *Humble Exploration Co., Inc.* v. *Fairway Land Co.*, 641 S.W.2d 934, 936 (Texas Civ. App. — Dallas 1982).

[26] Thus the fact that Justice Embry was sitting on the state court of last resort cannot serve to distinguish his situation from that of Judge Walker. Even in the first instance, "Justice Embry's participation in th[e] case violated appellant's due process rights". 106 S.Ct. at 1587. It would be more than a little weird

There are, to be sure, certain rights secured by the Constitution whose violation cannot be said to have occurred, in a completed sense, unless and until the state "refuses to provide a suitable postdeprivation remedy." *Hudson*, 468 U.S. at 533. Such rights include, for example, the right not to be deprived of private property for public use without just compensation,[27] and the right — when the requirement of a predeprivation hearing is obviated by impossibility,[28] impracticability,[29] or exigent circumstances[30] — not to be deprived of property without a suitable postdeprivation hearing. But nothing in the decisions of this Court remotely supports the view that *all* procedural rights are of this character. Surely the elemental right to a fair trial before an impartial judge — the right at issue in this case — is a right whose violation is complete when an

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if the *Aetna* holding applied only to a state's highest court, because of the availability of state appeal from the decisions of biased or conspiring judges in lower state courts. Indeed, the Fifth Circuit offers no reason why its insistence on inquiring whether "a *state system as a whole* provides due process of law" (A65) (emphasis added) should be arbitrarily limited to the judicial branch of state government. So long as the legislature remains open to receive individual pleas for justice, much as Congress considers private bills or as the House of Commons considers private acts to overturn final judicial decrees of the House of Lords, the logic of the court below would require a conclusion that the Constitution had not been offended, no matter how egregious the bias or corruption in the state's courts. *Cf. Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798) (upholding over challenge as an *ex post facto* law a state legislature's resolution that (1) set aside a probate court decree that had failed to approve a will and (2) granted a new hearing — at which the will was approved — after the ordinary right of appeal had expired).

[27] *See, e.g., Hudson* v. *Palmer*, 468 U.S. at 539 (O'Connor, J., concurring) (no unconstitutional taking results if just compensation is provided). *Cf. Barney* v. *New York*, 193 U.S. 430 (1904) (dismissing federal suit seeking to enjoin city's railroad construction as deprivation of property).

[28] *See, e.g., Parratt* v. *Taylor*.

[29] *See, e.g., Ingraham* v. *Wright, supra*.

[30] *See, e.g., North American Cold Storage* v. *Chicago, supra*.

unfair trial has been held and a corrupt judgment has been entered as a result. The right to a fair trial, after all, is a right to a fair *trial* — not merely a right to fairness in the state's process of judicial review at some point before this Court is asked to grant certiorari.

Were the law otherwise, it would follow that a litigant seeking a reversal of a trial court verdict in a state appellate tribunal would be limited to invoking state grounds for relief, and could never argue that the Constitution's due process guarantee had been violated by the way the trial was conducted — since no state denial of due process could be deemed complete and ripe until the conclusion of all state appeals. Yet nothing short of so bizarre a conclusion follows from the Fifth Circuit's holding that the right to a fair trial has no substantive content, but merely triggers a procedural requirement of post-trial correction by a state appellate court.[31]

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[31] Even if federal law should be construed to provide no remedy against those private persons who injure others by conspiring with trial judges in circumstances where state appellate review is fully available to undo the resulting harm, that principle should have no application where, as here, access to the state's appellate system has been denied on the basis of the injured party's defensive assertion, in a federal forum, of a collateral attack on the state trial adjudication. *See* n.12 *supra*.

Petitioner does not here seek certiorari on the separate ground that such forfeiture, based on a defensive pleading in a federal suit, renders the state's corrective system constitutionally insufficient. He does, however, urge that, even if the Fifth Circuit's broad reading of *Parratt* and *Hudson* were otherwise correct, those decisions do not warrant dismissal of a § 1983 claim where, as here, the state appellate remedy was not meaningfully available. Indeed, it would be little short of bizarre to view this case as a suitable occasion for *Parratt* and *Hudson* to be interpreted — for the first time — as the Fifth Circuit read them. Those cases, after all, explicitly require a *meaningful* postdeprivation remedy. Nor is this an appropriate case in which to pioneer even a limited exhaustion requirement for § 1983 actions, since Petitioner pursued — and was turned away from — the only appellate remedies offered by Texas.

The fact that the constitutional violation alleged in the complaint is already complete therefore takes this case completely outside the ambit of *Parratt* and *Hudson*.[32]

III. THE FIFTH CIRCUIT'S RADICAL EXPANSION OF THE *PARRATT/HUDSON* EXCEPTION CONFLICTS WITH THE HOLDINGS OF OTHER CIRCUITS.

In denying Holloway's petition for rehearing, the Fifth Circuit specifically addressed "authority from several circuits conflicting with the decision[ ] rendered by this court in the present case" (A60), but expressly declined to follow those authorities.

In *Patterson* v. *Coughlin*, 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 879 (1986), a prisoner brought suit after being sentenced to isolation and deprived of good-time credit in violation of state law and without being afforded a hearing conforming to the due process standards set out in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). The Second Circuit began its analysis by observing that "[i]t has long been settled that unconstitutional conduct that *also* violates state law is still actionable under § 1983," 761 F.2d at 891 (original emphasis),

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[32] The only other way to read the Fifth Circuit opinion is that there *is* a complete due process violation, but that the state should have a chance to cure it before a federal court gets involved pursuant to a claim under § 1983. Such a holding, of course, could not be reconciled with this Court's decisions in *Monroe* v. *Pape*, *supra*, and *Patsy* v. *Florida Bd. of Regents*, 457 U.S. 496 (1982), that § 1983 does not require the exhaustion of state judicial or administrative remedies. And if this is what the court below in fact held, then its decision is in direct conflict with *Patterson* v. *Coughlin*, 761 F.2d 886, 893 (2d Cir. 1985) ("Once a cause of action for a constitutional violation accrues, nothing the state does subsequently can cut off the § 1983 claim"), *cert. denied*, 106 S.Ct. 879 (1986).

and that "[a]llegations of procedural due process violations by certain individual government employees, as opposed to direct challenges to state procedures or the lack thereof, have long been accepted as constituting state action and forming the basis for a claim under the civil rights statutes." *Id.* The prisoner's claim certainly fell within this category, and the *Parratt/Hudson* exception did not dictate a different conclusion: "although the denial of due process may have been 'unauthorized' " — since the prison officials violated state law as well as the *Wolff* standards — "the deprivation of liberty at issue here does *not* appear to have been 'unauthorized' as that term is meant by *Parratt*." *Id.* at 892 (original emphasis). The *deprivation* was pursuant to an established state prison disciplinary procedure, and the Second Circuit held that the *Parratt/Hudson* exception simply had no bearing on a § 1983 claim that state officials conducted a hearing that *itself* violated standards of due process. "*Parratt* did not alter the fundamental tenets of due process." *Id.*

The court below flatly rejected the Second Circuit's analysis, insisting that "[i]f laws and regulations providing due process exist in theory," no constitutional violation occurs "merely because the official who randomly deprives [someone] of liberty or property without the hearing required by state law has the power to grant such a hearing." (A63-64). Thus, contrary to the rule of *Hudson* v. *Palmer* that the question is whether the "*deprivation of property* is caused by conduct pursuant to an established state procedure," 468 U.S. at 532 (emphasis added), the Fifth Circuit instead inquired whether the *denial of due process* was part of the "ordinary practice" of "the state system." (A63). The court below reasoned that, since Texas has "rules against judicial bias and conspiracy . . . it is clear that any violation of these rules by a Texas judge would be a random act." (A64). According to the Fifth Circuit, a § 1983 complaint can escape summary dismissal only if it alleges that

state "laws and regulations providing due process" are "systematically ignored." (A63).

The court below likewise "decline[d] to follow the view of the Ninth Circuit." (A61). Sitting *en banc* in order to resolve "the doctrinal ambiguity which exists in this circuit over the application of *Parratt* v. *Taylor*," the Ninth Circuit considered a § 1983 complaint alleging a conspiracy among police, prosecutors and others to bring fraudulent burglary charges against the plaintiff, and to harass him by means of false testimony, perjury and prosecutorial misconduct. *Bretz* v. *Kelman*, 773 F.2d 1026, 1027 (9th Cir. 1985). As a result of the false charges, of which plaintiff Bretz was acquitted, he was denied bail on an unrelated charge. In a unanimous *en banc* decision, the Ninth Circuit held that the "*Parratt* analysis, in which the touchstone for predeprivation process is the feasibility of providing such process, is simply inapplicable where the alleged deprivation is inextricable from the alleged corruption of the process which the state ordinarily could provide." 773 F.2d at 1031.[33] Therefore, "[i]t is meaningless to speak of the state's ability to provide postdeprivation remedial process where the state process itself has been abused." *Id.*[34] Despite *Parratt* and *Hudson*, an abuse of power by a state official resulting in harm

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[33] The Ninth Circuit read *Parratt* and *Hudson* as applying only to situations where "it is impracticable or impossible for the state to provide predeprivation process because the governmental machinery cannot foresee or predict random unauthorized actions." 773 F.2d at 1030. In such cases, the state "must be given an opportunity to redress a minor deprivation before a constitutional violation can have occurred" at all. *Id.* at 1031.

[34] The *Bretz* court saw the "challenge to a direct abuse of the state process itself" as falling within the *Logan* exception. 773 F.2d at 1031. Whatever the merits of that particular view, *see* n.24 *supra*, the Ninth Circuit in any event found that conspiratorial abuse of state authority can provide a basis for a sound claim under § 1983. Petitioner need not rely on the Ninth Circuit's broad reading of *Logan*, which is also in conflict with the reading of the Fifth Circuit (*see* A61-62), in order to find *Bretz* in conflict with the Fifth Circuit's application of *Parratt* and *Hudson*.

through the corruption of state judicial procedures is still a violation of the Fourteenth Amendment and therefore, according to the unanimous Ninth Circuit in *Bretz*, is cognizable under § 1983. Curiously, the court below found this reasoning "unpersuasive." (A61).

Unlike circuit conflicts involving interpretation of relatively recent statutes or the resolution of relatively marginal issues, this conflict goes to the very heart of the federal system as envisioned by the Fourteenth Amendment and as implemented by Congress in the wake of the Civil War. No such conflict should be permitted to persist while this Court sits.

In any event *this* Court, rather than the Fifth Circuit, is the appropriate forum to determine whether the *Parratt* and *Hudson* cases relegated the unanimous decision in *Dennis* v. *Sparks* to the status of an academic curiosity, and whether those cases are to be read as largely supplanting the corpus of Fourteenth Amendment doctrine that this Court has nurtured for over a century. If a negative answer seems as clear to the Court as it does to Petitioner, reversal *per curiam*, without further ado, is in order. Otherwise, this case should be scheduled for plenary briefing and argument.

Respectfully submitted,

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August 21, 1986

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PAT S. HOLLOWAY,
Plaintiff-Appellant,

No. 85-1289

v.

OPINION

JUDGE DEE BROWN WALKER, et al.,
Defendants-Appellees.

Filed March 19, 1986

Before: Charles Clark, Chief Judge, Henry A. Politz, and Jerre S. Williams, Circuit Judges.

Appeal from the United States District Court
for the Northern District of Texas
Barefoot Sanders, District Judge, Presiding

CHARLES CLARK, Chief Judge:

On November 18, 1982, Pat S. Holloway, Humble Exploration Company, Inc., and Sterling Pipeline Company (hereinafter Humble and Holloway" or "plaintiffs") brought this action pursuant to 42 U.S.C. § 1983 against Judge Dee Brown Walker, the Brownings (Jane H. Browning, Katherine Louise Browning Cook, Averille Adams Browning, William Webb Browning, III, Winifred Fallon Browning, Robert Holland Browning, and others), G.H. Kelsoe, Jr. and R. Jack Ayres, Jr. (attorneys for the Brownings) and John Wright, Jr., who had served as a receiver appointed by Judge Walker (hereinafter

collectively "defendants"). Holloway and Humble alleged that the appellees had conspired to control the outcome of a state court lawsuit over which Judge Walker presided and thereby deprive plaintiffs of their property without due process of law. The plaintiffs also asserted pendent state law claims. The district court held that the acts alleged by plaintiffs did not violate the due process clause of the Fourteenth Amendment and dismissed the § 1983 action and the pendent state claims. We affirm.

I. FACTS

The facts pertinent to this case were recited in an earlier opinion of this court, *Holloway v. Walker*, 765 F.2d 517, 519-21, *reh'g en banc denied*, 773 F.2d 1256 (5th Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985), and we add only the material in brackets:

> The complicated history of this case begins on September 12, 1979 when the Brownings . . . filed suit against Humble, Holloway and others in the 193rd Judicial District Court of Dallas County, Texas, seeking, as the alleged equitable owners of substantially all of the assets of Humble and Holloway, the imposition of the constructive trust on Humble's and Holloway's assets, actual and exemplary damages, and the appointment of an interim receiver to manage the disputed assets. Sterling Pipeline Company was later added to the case. (The lawsuit is hereinafter referred to as the "1979 case"). On November 19, 1979, Humble and Holloway filed Chapter 11 voluntary bankruptcy petition and removed the 1979 case to the United States Bankruptcy Court for the Northern District of Texas, pursuant to 28 U.S.C. § 1478(a).

The parties entered a "Stipulation and Agreement on Manner in Which Controversy Shall Be Heard, Determined and Liquidated," which was approved by the bankruptcy court and annexed to the court's January 18, 1980 "Order Remanding Causes of Action and Modifying Automatic Stay." The remand order remanded the 1979 case to the 193rd Judicial District Court pursuant to the terms of the stipulation and agreement, and modified the automatic stay to permit trial of the case upon remand, subject to the terms of the stipulation and agreement. The stipulation and agreement provided, among other things, that upon remand of the case the parties would request the presiding judge of the administrative judicial district to assign a visiting or retired state judge to hear the consolidated cases.

The case was remanded and the presiding judge assigned it to a retired state judge who ordered enforcement of a prior settlement agreement. In 1981, the Court of Appeals for the Fifth Supreme Judicial District of Texas (the "Texas court of appeals") reversed the order enforcing the settlement agreement and remanded the case for a jury trial. The Texas Supreme Court found no reversible error. Upon remand from the state appellate courts, the 1979 case was assigned to a different retired state judge who entered an order nullifying the prior settlement agreement.

On May 26, 1982, a group of investors sued Holloway and Humble in the 162nd Judicial District Court of Dallas County, Texas, Judge Dee Brown Walker presiding, claiming that Humble had wrongfully shut-in over 150 oil and gas wells jointly owned by the investors and Humble. This suit is alleged by

Holloway to have been brought pursuant to the conspiracy, solely for the purpose of creating a case before Walker into which the 1979 action could be consolidated, in violation of the agreement that restricted the judge who could hear the 1979 action to one who had retired or was visiting the judicial district. The investors sought the appointment of a receiver over Humble's assets. (The case is hereinafter referred to as the "1982 case"). The Brownings were named as defendants in the 1982 case because of their claim to ownership of Humble's and Holloway's assets. The 1982 case was removed to the bankruptcy court and remanded to Judge Walker's court on the same day.

On May 28, 1982, Judge Walker appointed a receiver in the 1982 case over Humble's and Holloway's assets. Thereafter "ensued a somewhat dizzying sequence of state court orders," most of which were issued by Judge Walker, and recounted in *Browning v. Navarro*, 37 B.R. 201, 205-06 (D.C. N.D. Tex. 1983), which resulted in the transfer and consolidation of the 1979 case into the 1982 case before Judge Walker in the 162nd Judicial District Court. On June 24, 1982, the May 28, 1982 receivership order having been vacated by the state court of appeals, Judge Walker granted the Brownings' request for a separate and expedited trial of the 1979 case. On August 26, 1982, after month-long trial, judgment was entered in the 1979 case for the Brownings, imposing a constructive trust on Humble's and Holloway's assets and awarding the Brownings actual damages of $72,000,000 and exemplary damages of $10,000,000.

On November 18, 1982, Humble and Holloway brought the action in which the present appeal is taken [the "§ 1983 action" or the "civil rights case"] against Judge Walker, the Brownings, legal counsel for the Brownings and many others, alleging that all the defendants had conspired to violate Humble's and Holloway's civil rights in the 1979 case. The complaint alleges that Walker and the other defendants conspired to seize control of Humble through the abuse of Walker's judicial office. Holloway contends that pursuant to the conspiracy Walker arranged to have the 1982 case brought before his court contrary to the usual procedure for assigning cases, that Walker thereafter arranged to have the 1979 and the 1982 cases consolidated in his court, that he imposed receiverships on Humble's and Holloway's assets, defied a mandamus order of the Texas Court of Appeals to refrain from interfering in Humble's business, appointed an incompetent receiver for Humble, dismissed many Humble personnel, posted guards at Humble's headquarters to seize the building, and, in a hotel near the courthouse, conducted meetings regarding Humble's business, all in furtherance of the conspiracy. Holloway contends extensive damage was done to him and Humble through Walker's pernicious actions. . . .

Holloway's complaint requests damages as well as equitable and declaratory relief under section 1983. In addition, Holloway requests similar relief under Texas state law. [Judge Walker moved to dismiss the civil rights claim against him based on the doctrine of judicial immunity. The district court denied his motion and Judge Walker appealed. This court held that Walker was entitled to the benefit of

judicial immunity and dismissed all damage and state law claims against him. *Holloway v. Walker, supra.* 765 F.2d at 526. Therefore, only the equitable and declaratory claims remain as to Walker].

After Humble and Holloway filed the civil rights case they perfected an appeal from the judgment in the 1979 case to the Texas court of appeals. The Texas court of appeals was the appropriate Texas appellate court to hear the appeal of a case from Judge Walker's court. However, neither Humble nor Holloway posted a supersedeas bond to stay execution of the judgment in the 1979 case pending their appeal.

The Brownings then brought an action in the United States District Court (the "turnover action") to obtain possession of Humble's and Holloway's assets which, according to the judgment in the 1979 case, were being held for their benefit. Humble, Holloway and their trustee, Dan Navarro, refused to turn the assets over to the Brownings. They argued that the proceedings before Judge Walker, an active judge, were void because the 1979 case was tried in contravention of the bankruptcy court's original remand order. The United States District Court granted a summary judgment in favor of Navarro and held that the trial of the 1979 case before Judge Walker was void. This court, however, reversed the district court's determinations and held that the trial before Judge Walker was not void because the remand order had been satisfied. *Browning v. Navarro,* 743 F.2d 1069 (5th Cir. 1984).

The appeal of the 1979 case was pending in the Texas court of appeals while the turnover action was being litigated in the United States District Court.

The Texas court of appeals, however, believed that the turnover action constituted a collateral attack on Judge Walker's judgment in the 1979 case. Therefore, the Texas court of appeals dismissed Humble's and Holloway's appeal because it did not believe Humble and Holloway were entitled to two appeals from the judgment in the 1979 case. [After the reversal of the district court's decision in the turnover action, the Texas court vacated its prior order of dismissal. However, the appellate court, sitting *en banc*, later reinstated the order of dismissal. *Humble Exploration Co. v. Browning*, 690 S.W.2d 321 (Tex. Ct. App. 1985) (en banc), *reinstating* 677 S.W.2d 111 (1984). With the Texas Supreme Court's denial of Humble's and Holloway's application for writ of error, it appears that appellees have no further recourse in the state courts].

[The various defendants in the civil rights case moved for summary judgment. On March 11, 1985, the district court granted summary judgment for defendants with respect to Humble's and Holloway's claims of deprivation of procedural due process. The court relied on *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) and *Hudson v. Palmer*, ____ U.S. ____, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). However, the district court denied summary judgment for defendants with respect to the claims of deprivation of substantive due process. The court concluded that the right to a fair trial was a substantive due process right and therefore did not fall within *Parratt/Hudson*. It also found that a genuine issue of material fact existed as to whether defendants had violated this right through a conspiracy with Walker. However, on March 28, 1985, the

district court found that with respect to certain of the defendants, the "Browning Interests," there was no genuine issue of material fact that the Browning interests defendants participated in the alleged conspiracy and therefore granted summary judgment for these defendants on all the federal claims. Finally, on April 18, 1985, the court reversed its earlier ruling on the substantive due process issue. It concluded that the alleged conspiracy would violate no substantive due process right. The court granted summary judgment for all defendants,, dismissing plaintiffs' § 1983 claims with prejudice. Humble and Holloway appeal from all three adverse rulings of the district court].

II. *PARRATT/HUDSON*

The principal issue presented in this appeal is whether the § 1983 claim advanced by plaintiffs Humble and Holloway, i.e., that they were deprived of a fair trial by virtue of a conspiracy between Judge Walker and the opposing litigants, is barred by the Supreme Court's holdings in *Parratt v. Taylor* and *Hudson v. Palmer, supra*. In *Parratt* a Nebraska state prisoner brought a § 1983 action to recover the value of a hobby kit negligently lost by a prison employee. He claimed that he had been deprived of his property "without due process of law." The Supreme Court rejected this claim. *Parratt*, 451 U.S. at 543 101 S.Ct. at 1917. The Court reasoned that it was not practicable for the state to provide a hearing *before* a random and unauthorized deprivation of property by a state employee, since the state could not tell when such deprivations might occur. Thus, postdeprivation tort remedy provided by

the state constituted all the process that was due.[1] *Id.* at 541-44, 101 S.Ct. at 1916-17. The Court emphasized that there was no allegation that the deprivation of property resulted from constitutionally inadequate state procedures. *Id.* at 543, 101 S.Ct. at 1917. Finally, the Court noted that to hold that "the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983." *Id.* at 544, 101 S.Ct. at 1917; *see also id.* at 544, 101 S.Ct. at 1922 n.13 (Powell, J., concurring in the result) ("[i]t is not in the interest of claimants or of society for disputes of this kind to be resolved by litigation that may take years, particularly in an overburdened federal system that never was designed to be utilized in this way").

In *Hudson*, the *Parratt* rule was extended to a situation where the alleged deprivation of property was intentional rather than negligent. Reasoning that unauthorized intentional wrongs were no more predictable, and perhaps less so, than negligent behavior, the Court held that due process was not violated when a prison employee allegedly seized noncontraband property from a prisoner's cell during a "shakedown" search. *Hudson, supra*, U.S. at ____. 104 S.Ct. at 3203-05. The Court noted that the prisoner could obtain adequate compensation for his loss through state law tort remedies. *Id.* at ____, 104 S.Ct. at 3204.

The district court in the present case held that the *Parratt/Hudson* rule barred the plaintiffs' action because the alleged conspiracy by the state court judge to deprive plaintiffs of their

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[1] In *Daniels v. Williams*, ____ U.S. ____, 106 S.Ct. 662, 663, 88 L.Ed.2d (1986), the Court concluded that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property."

property constituted a random and unauthorized act by a state employee. The opportunity to appeal from the judgment was an adequate postdeprivation remedy; thus plaintiffs, though deprived of their property, were not deprived of due process.

Plaintiffs, however, seek to distinguish *Parratt/Hudson* on two grounds. First, they argue that, unlike the situation in *Parratt* and *Hudson*, the deprivation in this case was pursuant to an established state procedure, rather than simply the result of a random and unauthorized act. Secondly, they contend that the actions of defendants deprived them not only of a procedural due process right, as was the case in *Parratt* and *Hudson*, but also of a substantive due process right to a fair trial. We discuss these contentions separately.

A. *Established State Procedure*

[1] Relying on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265 (1982), plaintiffs argue that the *Parratt/Hudson* rule does not apply where a plaintiff is deprived of property pursuant to an established state procedure. In *Logan*, the plaintiff brought a discrimination complaint before the Illinois Fair Employment Practices Commission within the period provided for by statute. The Commission was required by state statute to act on the complaint within 120 days, but it inadvertently failed to do so. The Illinois Supreme Court held that the Commission's failure to act within the statutory period deprived it of jurisdiction to hear the complaint at all. *Id.* at 426-28, 102 S.Ct. at 1152-53. Thus, Logan's cause of action was extinguished solely due to the inaction of the Commission over which Logan had no control. In holding that Logan had been deprived of his cause of action without due process, the Court distinguished *Parratt*:

> In *Parratt*, the Court emphasized that it was dealing with "a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure." Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference — whether the Commission's action is taken through negligence, maliciousness, or otherwise. *Parratt* was not designed to reach such a situation. Unlike the complaint in *Parratt*, Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.

Id. at 435-36, 102 S.Ct. at 1158 (citations omitted).

[2] Plaintiffs argue that because their property was taken through a judicial proceeding, which obviously is an established state procedure, the *Logan* exception to *Parratt* applies. However, plaintiffs do not challenge the validity of the established procedure, as did the plaintiff in *Logan*, but the alleged illegal and unauthorized acts of Judge Walker. While in *Logan* it was possible for the state to remedy the defective procedure so as to prevent the challenged deprivation of property, in the case at bar there is no practical way for Texas to prevent a biased or corrupt judge from depriving a litigant of property in the first instance.

[3] Of course, it is possible for a procedure for choosing judges to be constitutionally inadequate because it makes bias or corruption likely. For example, in *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S.Ct. 80, 83, 34 L.Ed.2d 267 (1972), the Court held that a statute authorizing mayors to act

as judges in cases involving certain ordinance and traffic infractions violated due process because the fines collected in those cases made up a substantial portion of the village income and "the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." It is not contended here that Texas procedure is inadequate in this respect. Indeed, plaintiffs do not seriously challenge the constitutional adequacy of any part of the Texas judicial system. Plaintiffs do contend that "the Texas system can be abused so as to permit the arbitrary and capricious conduct of one of its judicial officials, through the rendition of a final judgment, to destroy the due process and property rights of a person appearing before him." However, no judicial system offers any guarantee, other than the postdeprivation right of appeal, that an individual judge will not act arbitrarily or corruptly.

[4] The Texas court system provided an adequate postdeprivation remedy through the right of appeal to restore any wrongfully taken property to its owner. In the absence of any challenge to the established judicial procedure of Texas or allegation that Judge Walker's conspiratorial acts "represented official policy," *see Augustine v. Doe*, 740 F.2d 322, 328-29 (5th Cir. 1984), the *Logan* exception is inapplicable to this case.

Furthermore, plaintiffs' argument is clearly foreclosed by *Collins v. King*, 743 F.2d 248 (5th Cir. 1984), in which this court held that a prisoner's complaint that a member of a disciplinary tribunal was biased against him did not state a due process claim. The court applied the *Parratt/Hudson* rule, noting that "Collins does not assert that it was part of state procedure to constitute tribunals such as his in such a manner." *Id.* at 254. Similarly, in the present case plaintiffs' complaint of a random instance of a biased tribunal does not state a procedural due process claim under *Parratt/Hudson*.

Plaintiffs rely on *Shelton v. City of College Station*, 754 F.2d 1251 (5th Cir. 1985), *vacated and rev'd on other grounds*, No. 83-2765, slip op. (5th Cir. Jan. 6, 1986) (en banc), in which the court stated that "the principle established by *Parratt* does not apply when the plaintiff's claim is based either upon deprivation of a liberty interest or (as here) upon the intentional deprivation of a property interest 'pursuant to established state procedure.'" *Id.* at 1257 (citing *McCrae v. Hankins*, 720 F.2d 863, 870 (5th Cir. 1983).[2] This statement is not infringed by our holding here. Indeed, it emphasizes what we stress, namely, that the due process challenge must be the established state procedure itself and not to a random and unauthorized act of a state employee. At any rate, the quoted language from *Shelton* come within a discussion of a claim of denial of substantive due process, not procedural due process, and thus is of dubious relevance to the issue presented here. *See infra* (discussion of plaintiffs' substantive due process claim).

[5] Finally, we reject plaintiffs' argument that because the operation of Texas procedural rules has deprived them of their right of appeal in state court that they do not have an adequate postdeprivation remedy within the meaning of *Parratt/Hudson*. Nothing in *Parratt* or *Hudson* suggests that a postdeprivation remedy is inadequate merely because it is possible for a litigant to forfeit the remedy by virtue of the operation of reasonable state procedural rules. Plaintiffs do not challenge the constitutionality of the procedural rules themselves.

For the foregoing reasons defendants were entitled to summary judgment on the procedural due process claim.

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[2] Obviously, *McCrae*, which held that *Parratt* did not apply to intentional deprivations of property interests, was overruled by the Supreme Court's decision in *Hudson*.

B. *Substance or Procedure*

[6] In *Augustine, supra,* 740 F.2d at 327, we held that *Parratt* applies only asserted violations of procedural due process, not of substantive due process. Emphasizing this holding, plaintiffs argue that the "right to a fair trial" is a substantive due process right and that therefore *Parratt/Hudson* is inapplicable. They argue that a fair trial is "implicit in the concept of ordered liberty," *see Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed.2d 188 (1937), and that a judicial conspiracy to deprive litigants of their property "shocks the conscience," *see Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed.2d 183 (1952).

[7] Assuming for the sake of this analysis that plaintiffs established a judicial conspiracy, the resultant shocked conscience cannot displace common sense. That sense dictates that the right to an impartial judge is a matter of procedural, not substantive, due process. *See e.g., Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980) ("requirement of neutrality in adjudicative proceedings safeguards the . . . concerns of procedural due process"). To hold otherwise would be to fictionalize solely for the purpose of avoiding application of *Parratt/Hudson* a situation to which *Parratt/Hudson* was clearly meant to apply, i.e., where a plaintiff is deprived of his property by the unexpected, unauthorized act of a state employee. As the district court noted, the effect of accepting plaintiffs' argument would be to hold that although a person fails to state a due process claim by complaining that he was deprived of property without due process (under *Parratt/Hudson*), he nonetheless states a due process claim by complaining he was not provided due process while being deprived of his property. We cannot undermine *Parratt/Hudson* in this way.

Plaintiffs rely principally on *Ward, supra* at note 1, to substantiate their claim that a biased judge violates substantive due process. Nowhere in *Ward*, however, does the Court state that the right to an impartial tribunal is a substantive right. *Ward* held that it was a constitutional violation to allow mayors to sit as judges in cases where the fines imposed went into the village treasury and that this combination of authorized procedures could not be corrected by a litigant's later opportunity for an impartial adjudication. 409 U.S. at 61-62, 93 S.Ct. at 84. However, this holding merely illustrates the principle, discussed above in connection with procedural due process, that a deprivation pursuant to an established state procedure that is itself constitutionally defective cannot be cured by a postdeprivation remedy. It does not convert procedure into substance.

In *Collins, supra*, 743 at 250, we stated that an allegation of a biased tribunal was clearly a procedural due process complaint. In *Shelton, supra*, 754 F.2d at 1258-59, we treated an allegation of a biased fact-finder as a procedural due process complaint. Nothing in these cases suggests that the issue of the impartiality of a tribunal could be matter of substantive due process.

The allegation of a judicial conspiracy does not state a substantive due process claim. Summary judgment was properly entered for defendants on this claim.

III. PENDENT CLAIMS

Plaintiffs contend that the district court abused its discretion by dismissing the pendent state claims, including claims of negligent and wrongful receivership. However, as the district court pointed out, federal courts strive "to abstain from adjudicating the validity and propriety of the actions of the re-

ceiver appointed by a state court." No abuse of discretion by the district court has been shown. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) ("if the federal claims are dismissed before trial, even though not unsubstantial in a jurisdictional sense, the state claim should be dismissed as well").

IV. CONCLUSION

The Constitution of the United States marks the jurisdictional line for this § 1983 action. Plaintiffs level grave charges against Judge Walker and the opposing litigants. Plaintiffs' rights of state court review were lost by a unique, complex mix of events (which plaintiffs played a major part in creating). Nevertheless, these alleged acts of judicial conspiracy and lack of postdeprivation remedy do not amount to a violation of constitutional due process. The district court correctly granted summary judgment for defendants.[3] The district court's dismissal of the § 1983 claims and the pendent state claims is

AFFIRMED.
Judgment in accordance with opinion.

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[3] Our disposition of this case makes it unnecessary to reach plaintiffs' other contentions, including their argument that the district court erred in holding that the summary judgment record fails to demonstrate that the Brownings participated in the alleged conspiracy.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

PAT S. HOLLOWAY, et al.	*	
	*	
Plaintiffs	*	Civil Action
v.	*	No. 3-82-1846-H
	*	
JUDGE DEE BROWN WALKER, et al.	*	
	*	Filed April 18, 1985
Defendants	*	

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendant R. Jack Ayres, Jr.'s Motion to Clarify, Motion to Reconsider and in the Alternative, Motion to Certify, filed March 21, 1985, and Plaintiffs' Response, filed April 12, 1985.

By Memorandum Opinion and Order of March 11, 1985, the Court granted Defendant Ayres' Motion for Summary Judgment as it related to Plaintiffs' procedural due process claim and denied it as it addressed a substantive due process claim for the deprivation of a constitutional right to a fair trial.

Motion to Reconsider

Defendant Ayres seeks the reconsideration of the previous order and the grant of a total summary judgment. He argues that the claim of a trial before a biased decision-maker is one of procedural, and not substantive, due process. Upon further examination, the Court agrees.

The distinction is, of course, more than purely semantic. The Court has recognized that under *Hudson* v. *Palmer*, 104 S.Ct. 3194 (1984), the presence of an adequate state appellate remedy requires the dismissal of a procedural due process claim, while a substantive due process violation is actionable regardless of the availability of a post-deprivation process. *Wolf-Lillie* v. *Sonquist*, 699 F.2d 864, 871 (7th Cir. 1983); *Brewer* v. *Blackwell*, 692 F.2d 387, 385 (5th Cir. 1982); *Madden* v. *City of Meriden*, 602 F.Supp. 1160 (D.Conn. 1985); *Ramos* v. *Gallo*, 596 F.Supp. 833, 837 (D.Mass. 1984); *Spell* v. *McDaniel*, 591 F.Supp. 1090, 1106 (E.D.N.C. 1984); *Garcia* v. *County of Los Angeles*, 588 F.Supp. 700, 704 (C.D.Cal. 1984); *Irshad* v. *Spann*, 543 F.Supp. 922, 926 (E.D.Va. 1982). To violate substantive due process, a state's conduct must be inherently impermissible, regardless of any protective or remedial procedures it provides. *Schiller* v. *Strangis*, 540 F.Supp. 605, 613 (D.Mass. 1982).

The dividing line between substantive and procedural due process is not always clear, *Madden, supra*. When in doubt, a court should analyze the adequacy of a complaint under both theories.[1] *Ramos, supra*, at 837; *Garcia, supra*, at 705.

An unbiased decision-maker is certainly an ingredient of procedural due process, as Defendant capably documents his motion. *See also Serafin* v. *City of Lexington*, 547 F.Supp. 1118 (D.Neb. 1982), *aff'd*, 716 F.2d 909 (8th Cir. 1983). That conclusion does not, however, terminate the inquiry. A single act depriving a citizen of a right may simultaneously constitute a violation of substantive constitutional rights and of the right to procedural due process. *Owen* v. *Lash*, 682

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[1] It bears noting that recent Supreme Court cases have not analyzed section 1983 claims in terms of substantive due process. These seemingly deliberate omissions may mean that substantive due process requirements are satisfied when *Parratt* criteria are satisfied. But then again it may not. *Holmes* v. *Wampler*, 546 F.Supp. 500, 504-505 (E.D.Va. 1982).

F.2d 648, 652 n.4 (7th Cir. 1982), *citing Procunier v. Martinez*, 416 U.S. 396 (1973). The Court must thus determine whether a substantive guarantee to due process has been shown by Plaintiffs to have been violated.

Substantive due process represents a difficult-to-define protection from particularly outrageous official conduct which falls under no other specific constitutional protection. *Garcia, supra*, at 705. It is recognized as a last line of defense against those literally outrageous abuses of official power whose very variety makes formulation of a more precise standard impossible *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980).

In *Rochin v. California*, 342 U.S. 165, 169 (1952), the Supreme Court held that police action in prying open the mouth of a suspect and forcing him to vomit up evidence so "shocks the conscience" as to violate due process. In the words of Justice Frankfurter, "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or are 'implicit in the concept of ordered liberty'". [citations omitted].

Although this language is broad enough to support a colorful argument by Plaintiffs, *but see Engsberg v. Town of Milford*, 601 F.Supp. 1438, 1445 (W.D.Wisc. 1985), a review of the substantive due process cases reveals that consciences are only to absorb shocks in certain contexts. Specifically, substantive due process, which presumably derives solely from the fourteenth amendment, *Holmes, supra*, at 504 n.3,[2] protects the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court. *Juncker v. Tinney*, 549 F.Supp. 574, 581 (D.Md. 1982), *citing*

[2] The sixth amendment does not guarantee a federal right to a fair and impartial judge, as such. *Morgan v. Neal*, 325 F.Supp. 1196, 1206 (E.D.Tenn. 1970).

Hall v. Tawney, supra. The cases imply some minimum standard of severity of violation of bodily security and freedom as a prerequisite to the conclusion that a violation of the fourteenth amendment has occurred. *Madden, supra.* Although most of the cases of conscience shock have involved physical brutality, *see Johnson v. Glick,* 481 F.2d 1028, 1033 n.6 (2d Cir. 1973), *cert. denied,* 414 U.S. 1033 (1973), the Supreme Court has often noted in the analogous context of interrogation that psychological tactics can be equally destructive of human dignity. *Morrison v. Lefevre,* 592 F.Supp. 1052, 1078 (S.D.N.Y. 1984). *See also Shillingford v. Holmes,* 634 F.2d 263, 265-66 (5th Cir. 1981) (substantive due process claim stated for policeman's unprovoked and unjustified striking of a tourist who was photographing an arrest). *See generally* M. Wells and T.A. Eaton, Substantive Due Process and the Scope of Constitutional Torts, 18 Ga.L.Rev. 201. Plaintiffs' allegations do not fit into this pattern.

There are many other indications that a biased decisionmaker is solely a matter of procedural due process. *See Leverett v. Town of Limon,* 567 F.Supp. 471, 474 (D.Colo. 1983) (discussing substantive and procedural claims, and categorizing bias allegations under latter). The only contrary hints appear in cases such as *Ward v. Village of Monroeville,* 409 U.S. 57, 60 (1972), in which the Supreme Court found due process violated by a mayor's court in a village which derived a substantial part of its income from fines and costs imposed in those proceedings. The *Ward* court rejected the suggestion that any constitutional infirmity in the proceedings could be cured by an appellate right to trial de novo. *See also Chrysler Corp. v. Texas Motor Vehicle Commission,* slip op. at 3308, 3315 (5th Cir., March 28, 1985); *Brown v. Vance,* 637 F.2d 272, 279 (5th Cir. 1981) (challenging statutory fee system for compensating justices of the peace). *See generally Layer v. Lyles,* 598 F.Supp. 95 (D.Md. 1984) and cases discussed therein (discussing many cases involved biased judges).

The rejection of the curative potential of the appellate remedy in *Ward* and *Brown* could be argued to label the right to a fair trial as substantive, by implication. The Court is of the opinion, however, that the concept espoused in *Ward* is distinguishable. A basic prerequisite to the application of the *Parratt-Hudson* analysis is that the conduct of the state actor causing the deprivation be random and unauthorized. The availability of a state remedy is irrelevant, and the right may not be infringed in the first instance, when an established state procedure causes the deprivation. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982); *Vail v. Bd. of Educ. of Paris Union*, 706 F.2d 1435 (7th Cir. 1983), *aff'd*, 104 S.Ct. 2144 (1984); *Kumar v. Marion Cty. Comm*, 704 F.2d 908 (6th Cir. 1983); *Holmes v. Ward*, 566 F.Supp. 863 (E.D.N.Y. 1983). In the case of the operation of established procedures, such as in *Ward* and *Brown*, it is possible for state law to provide an adequate pre-deprivation safeguard, *viz.*, modification of the faulty procedure. *See Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (it is the "procedure" that creates the bias that denies due process). In the case of random, unauthorized acts, the state is powerless to remedy the possible abuses before they occur, and thus does not act unconstitutionally unless no post-deprivation remedy is available.

Sound policy also buttresses a conclusion that no substantive due process right exists beyond the procedural rights in this situation. If the lack of an impartial decision-maker does not *a priori* constitute a deprivation of procedural due process and does not automatically yield a federal constitutional claim for the improper deprivation of property, it is troubling to suggest that the same aggrieved party nevertheless possesses a separate substantive right that can be invoked to void the proceedings. Or as Defendant Ayres argues, "If a person fails to state a claim under the fourteenth amendment by claiming that he was deprived of property without due process, then he does not

state a claim under the fourteenth amendment by claiming that he was not provided due process while being deprived of his property." Motion at 7. It tortures the cognitive faculties to logically comprehend how "due process", which after all only appears once in the fourteenth amendment, can be simultaneously violated and not violated by the same acts. Needless to say, any purpose served by *Hudson* would be eviscerated by such an arrangement.

Without expressing an opinion on the merits of the allegations in this case, the availability of a substantive due process remedy will encourage a staggering volume of constitutional challenges by disgruntled civil litigants, from whom charges of bias, bad faith and other opprobrious epithets of malice are commonplace. *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985). Such claims are better relegated to the normal corrective processes of the state courts.

Pendent Claims

Plaintiffs also assert several pendent claims, including allegations of negligent and wrongful receivership. The viability of many of these causes of action asserted by Plaintiffs is in serious doubt given recent actions by the state courts on Plaintiffs' appeal. In *United Mine Workers v. Gibbs*, the Supreme Court stated that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. 715, 726 (1966). This rule has been followed often in this circuit. *See Tinker v. DeMaria Porsche-Audi, Inc.*, 632 F.2d 520 (5th Cir. 1980); *Daniels v. All Steel Equipment, Inc.*, 590 F.2d 111 (5th Cir. 1979) This general rule, however, is not absolute. The oft-times divergent goals of state and federal comity, judicial economy, convenience and fairness should be considered in exercising what is a matter of discretion. *Ingram Corp.*

v. J. Ray McDermott & Co., Inc., 698 F.2d 1295, 1319 (5th Cir. 1983).

The court is of the opinion that the viable pendent claims, if any, should be heard in the state courts. The ultimate determination of the ownership of the property underlying the claims will eventually come from the state courts. The federal courts have previously indicated a desire to abstain from adjudicating the validity and propriety of the actions of the receiver appointed by the state court. *See Humble Exploration Company, Inc. v. The Browning Interests*, Adv. No. 382-0864-G (Order of October 5, 1982). No motions addressed to the substance of the pendent claims have been filed or considered by this Court. An adequate state forum is available.

The Court finds that the pendent claims were not filed in federal court "in intentional disregard of jurisdiction", *see* Tex.Rev.Civ.Stat.Ann. art. 5539a (Vernon 1958). Article 5539a governs the refiling in state court and is liberally construed in favor of preserving Plaintiffs' claims. *Griffen v. Big Spring I.S.D.*, 706 F.2d 645, 650-51 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 525 (1983).

Accordingly, the court is of the opinion that Defendant Ayres' Motion to Reconsider should be and hereby is, GRANTED; the Court's Memorandum Opinion and Order of March 11, 1985, is MODIFIED consistent with this Opinion; all Defendants' Motions for Summary Judgment are GRANTED and Plaintiffs' claims under 42 U.S.C. § 1983 are DISMISSED WITH PREJUDICE; and Plaintiffs' pendent claims are DISMISSED WITHOUT PREJUDICE to the timely refiling of same in state court.

SO ORDERED.

DATED: April 18, 1985.

/s/_____

BAREFOOT SANDERS
UNITED STATES
DISTRICT JUDGE

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

PAT S. HOLLOWAY, et al.	*	
	*	
Plaintiffs	*	Civil Action
v.	*	No. 3-82-1846-H
	*	
JUDGE DEE BROWN WALKER, et al.	*	
	*	Filed March 11, 1985
Defendants	*	

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendant R. Jack Ayres, Jr.'s Motion for Summary Judgment and to Dismiss, filed December 31, 1984; Plaintiffs' Response, filed January 20, 1985; Defendant's Reply, filed February 11, 1985; and Plaintiffs' Response, filed March 4, 1985.

Factual Background

The trial setting of this case will have come and gone if the Court attempts to narrate all of the facts, challenges to facts, negative facts and subfacts that have survived a series of battles by affidavit and deposition. The following, however, is an aerial reconnaissance of the currant deployment of the combatants.

Plaintiffs were unsuccessful litigants in a state court consolidated trial of *Jane H. Browning v. Pat S. Holloway* and *Fairway*

Land Company v. Humble Exploration Company, Inc., presided over by Defendant Walker in the 162nd District Court of Dallas County. As a result, Defendants Browning Interests were awarded damages and a constructive trust over most of the assets of Plaintiff Humble Exploration Company, Inc.[1] Plaintiffs here have appealed that state court judgment. Subsequent to the filing of this case, that appeal was dismissed on the ground that Plaintiffs (appellants) had taken inconsistent positions in their appeal and in *Browning v. Navarro*, CA-3-83-0380-H, also pending on this Court's docket. After the Fifth Circuit reversed this Court's finding that Judge Walker had no jurisdiction to try the state court case due to a violation of the bankruptcy court's remand order, *see* 743 F.2d 1069 (5th Cir. 1984), Plaintiffs have attempted to reinstate their state appeal. The success of that effort has been awaiting determination for the past few months.

In this action, brought under 42 U.S.C. § 1983 and a multitude of pendent state law claims, Plaintiffs have alleged that their opponents in the state court and their attorneys, conspired to have the case brought before Defendant Walker, who was allegedly predisposed to their effort by the provision of various legal and political services to him without charge in the past. It is further alleged that the conspiracy to rig the outcome of the trial was furthered through various *ex parte* meetings, and through the participation of Defendants Wright, Sessions and Hurt, the receiver placed in control of Humble by Defendant Walker, the receiver's attorney and accountant, respectively. This Court previously denied all of the parties' motions to dismiss.[2]

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[1] It has been suggested in papers filed in other manifestations of this litigation that Humble has been renamed as the result of an unrelated settlement with Exxon. Nevertheless, the use of the name Humble will persist here.

[2] It should be observed that the standards of pleading a case of this nature have been dramatically heightened in this Circuit since this Court's review of the complaint. *See Elliott v. Perez*, slip op. at 2246 (5th Cir. 1985).

The Procedural Due Process Claim

In ¶ 163 of Plaintiffs' First Amended Complaint, they state:

> Plaintiffs would show that the Defendants, by their foregoing acts and omissions violated 42 U.S.C. § 1983, by acting under color of state law, and thereby deprived Plaintiffs of their rights secured by the due process clause of the Fourteenth Amendment to the United States Constitution.

In clarification, Plaintiffs subsequently stated that Defendants conspired "in particular to deprive Plaintiff Holloway of his lawful use, right and title to one hundred (100%) percent ownership in and control over Humble and Sterling without due process of law. Plaintiffs' Status Report, filed April 7, 1983. Plaintiffs are thus arguing an intentional deprivation of property without due process under color of state law.

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

This deceptively straightforward provision has, in recent years, been placed before the judicial telescope to reveal a cratered and tortured landscape. As has recently been observed, its facial simplicity belies a variety of indeterminate facets to ponder:

> Section 1983 does not expressly provide for the type of mental state required by the tortfeasor, whether it be negligence, intentional or strict liability. It does not provide for an exhaustion-of-remedy rule in state court as a condition precedent to maintaining a § 1983 action in federal court. It does not state that if there is an adequate remedy at state law and in state court for the act committed, one is precluded from maintaining a § 1983 action in federal court. It makes no reference to immunities. It does not establish a priority between various constitutional rights, such as liberty or property under the Due Process Clause. It does not distinguish between procedural and substantive due process.

Eaton v. City of Solon, 598 F.Supp. 1505, 1509 (N.D. Ohio 1984). Nevertheless, such are the preoccupations of Civil Rights Act jurisprudence. This Court now turns to ponder one of these concerns.

Adequate State Remedy: You Can't Get Here from There

The Supreme Court has held that it is unnecessary to exhaust administrative or judicial remedies as a condition precedent to maintaining a § 1983 action. *Patsy v. Florida*, 457 U.S. 496 (1982); *Monroe v. Pape*, 365 U.S. 167 (1961). The decision in *Patsy* rested primarily on an analysis of the legislative history of Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, the forerunner of Section 1983, and the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997. In light of the original purposes of the 1871 Act, and the timidity with which Congress added a narrow and circumscribed exhaustion requirement to CRIPA, the Court concluded that a broader exhaustion doctrine in Section 1983 cases was not mandated. The Court stated that "[i]t is not for us to say whether

Congress will or should create a similar scheme for other categories of § 1983 claims or whether Congress will or should adopt an altogether different exhaustion requirement for non-prisoner § 1983 claims." 457 U.S. at 515.

Having laid it down that exhaustion was not required, the Court appeared to retire from the field, leaving the matter of further inroads on its non-exhaustion rule for Section § 1983 actions to the Congress. *Collins v. King*, 743 F.2d 248, 251 (5th Cir. 1984). The judicial hibernation was to be all too brief, as a corollary doctrine applicable only to procedural due process cases waited in the wings. *Id.*

For a well-rounded view of our present status, *Parratt v. Taylor*, 451 U.S. 527 (1981) must be laid on the table. In *Parratt*, the Supreme Court held that a Nebraska state prisoner had failed to allege a violation of the due process clause of the fourteenth amendment in his suit to recover the value of a hobby kit, negligently lost by prison employees. Although the Court termed the injury sustained by the prisoner a deprivation of property under color of state law, it was not a cognizable constitutional injury because it was not "without due process of law". 451 U.S. at 537. The critical factor was the existence of an adequate post-deprivation remedy in the form of a tort suit in state court.

Following a split among the circuits on whether *Parratt* applied to intentional deprivations, the other shoe fell in the guise of *Hudson* v. *Palmer*, 104 S.Ct. 3194, 3203-04 (1984), answering the question in the affirmative: "We hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the due process clause of the fourteenth amendment if a meaningful post-deprivation remedy for the loss is available." *Id.* The *Parratt-Hudson* doctrine defines and limits the constitutional right itself, rather than the remedy. *Thibodeaux v. Bordelon*, 740 F.2d 329, 337-38 (5th Cir. 1984).

The existence of the state process does not immediately torpedo the Section 1983 claim. It is, however, incumbent on the plaintiff to prove that the state remedy is inadequate. *See Marshall v. Norwood*, 741 F.2d 761, 764 (5th Cir. 1984); *Vicory v. Walton*, 721 F.2d 1062, 1066 (6th Cir. 1983), *rehearing en banc denied*, 730 F.2d 466 (6th Cir. 1984). The inadequacy does not, however, necessarily stem from a lack of congruency between the state and federal relief available, *Loftin v. Thomas*, 681 F.2d 364, 365 (5th Cir. 1982). More relevant is an unreasonable delay in providing the remedy, *Eaton*, 598 F.Supp. at 1512, or unreasonable barriers to its availability. The fundamental requirement of due process is the opportunity to be heard and it is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Plaintiffs allege a deprivation of an ownership interest in certain property. This deprivation allegedly resulted from the intentional acts of a state employee and private individuals engaged in a conspiracy with him. These predicates are squarely within the *Hudson* framework.

Defendant urges that the appellate process constitutes an adequate state remedy for the deprivation. He cites *Cohen v. City of Philadelphia*, 736 F.2d 81 (3d Cir. 1984). Cohen, a police officer, was dismissed from his employment because of suspected participation in a burglary. After acquittal, he was reinstated without an award of back pay. He sued under Sections 1983 and 1985 claiming a deprivation of property without due process for the refusal of the Civil Service Commision to grant him back pay. The Third Circuit held that no § 1983 claim was established because Pennsylvania provided for judicial review of the Commission's actions and the courts were empowered to correct any of the Commission's actions if they were "manifest abuses of discretion, are contrary to

law, or rest on findings of fact which are not supported by substantial evidence." 736 F.2d at 86. To rule otherwise would create the danger that:

> any plaintiff in a state court who was asserting a right within the broadly defined categories of liberty or property and who lost his case because the judge made an error could attack the judgment indirectly by suing the judge under section 1983. That would be an intolerable interference with the orderly operations of the state courts. Due process is denied in such a case only if the state fails to provide adequate machinery for the correction of the inevitable errors that occur in legal proceedings. (citations omitted).

Obviously, Plaintiffs here are alleging transgressions more serious than "inevitable errors", but it is such transgressions that give rise to the intentionality of the deprivation. The concerns are the same.

Plaintiffs' description of the improprieties at trial before Defendant Walker range from subtle to flagrant disregard of applicable substantive and procedural law. Virtually all of these matters, including the allegations of bias, are among the 211 points of error urged on appeal from the state court trial. *See* Attachment to Defendant Wright's Motion for Summary Judgment, filed February 25, 1985; *Compare, e.g.*, Points of Error 10-12 *with* First Amended Complaint ¶¶ 46-60 and *passim*; Points of Error 20-24 *with* ¶¶ 87-88; Points of Error ¶¶ 74-79 *with* ¶¶ 92-94, 99-101; Points of Error ¶ 61 *with* ¶ 105; Points of Error *passim with* ¶¶ 115-116; Point of Error ¶54 *with* ¶117; Point of Error ¶ 67 *with* ¶121; Point of Error ¶19 *with* ¶51; Points of Error ¶¶ 96-100 *with* ¶¶ 133-136; Points of Error ¶¶ 200-201 *with* ¶140. In other words, the acts evidencing and causing the deprivation are, for the most part, errors of law raised on appeal.

The state appellate courts have the power and responsibility to correct errors of law committed at the trial court level. The state courts are empowered to grant the relief of reversal and/or the provision of a new trial, a direct redress that this Court can, at best, approach indirectly.

In addition to the undoing of the allegedly erroneous resolution of the trial, state law provides remedies for damages associated with improper legal action, such as causes of action for wrongful and negligent receivership, asserted in this action, and malicious prosecution.

Plaintiffs argue that Defendant Ayres is estopped from asserting that the right of appeal constitutes an adequate remedy because of "his strenuous efforts" to deny Plaintiffs their right to appeal. This contention is irrelevant. Regardless of Defendant Ayres' successful or unsuccessful advocacy before the Dallas Court of Appeals, other Defendants, whose hands are arguably cleaner, can and have asserted the same objection to Plaintiffs' constitutional claim. It is irrelevant for this analysis whether Plaintiffs are successful on their appeal, or have run afoul of the appellate process. The due process doctrine does not require the Court to track the eventual disposition of inmate Taylor's tort claim or Plaintiffs' appeal. It is the existence of an available remedy that limits the right.

Accordingly, the Court is of the opinion that Defendant's Motion for Summary Judgment should be granted with respect to Plaintiffs' procedural due process claim.

Substantive Due Process

Plaintiffs raise explicitly for the first time the contention that their due process claim is also a substantive one. *See* Plaintiffs' Response to Reply. Specifically, Plaintiffs state that their claim is for a violation of the constitutional right to a fair trial. The Amended Complaint is broadly-worded enough to support this claim.

Substantive due process is a nebulous concept at best. *Barnier v. Szentmiklosi*, 565 F.Supp. 869, 879 (E.D.Mich. 1983). It seems to have its origins in Justice Cardozo's notion of immunities "implicit in the concept of ordered liberty". *Id.*, *citing Palko v. Connecticut*, 302 U.S. 319, 325 (1937). In *Rochin v. California*, Justice Frankfurter appeared to define the fourteenth amendment's substantive prohibition to conduct "that shocks the conscience" or "offends the community's sense of fair play and decency". 342 U.S. 165, 172 (1952).

The existence of an adequate state remedy and the reasoning of *Parratt* do not apply to cases of substantive due process violations, because the state is forbidden to deprive one of the right in question under any circumstances, regardless of the process provided. *Duncan v. Poythress*, 657 F.2d 691, 704 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012 (1982); *Nika Corp. v. City of Kansas City*, 582 F.Supp. 343, 360-61 (W.D.Mo. 1984). The right to a fair trial, before an unbiased judge, is a basic requirement of due process, *Nebraska Press Association v. Stuart*, 427 U.S. 539, 551 (1976); *Johnson v. Mississippi*, 403 U.S. 212 (1971), and is actionable under Section 1983. *Neal v. Brim*, 506 F.2d 6, 9 (5th Cir. 1975).

Plaintiffs allege that the rendition of free legal services by Defendants Kelsoe, Sessions and Wright and accounting services by Defendant Hurt several years prior to this litigation served as an inducement for Defendant Walker to be predisposed to Defendants' case. Plaintiffs' Response at 30. Defendant cites to Plaintiff Holloway's statement in a deposition that he was alleging the receipt of a bribe, Defendant's Exhibit 2 at 149, and proceeds to argue that the allegations do not meet the requirements of the criminal bribery statute. As Plaintiffs reply, this is not the point. The issue is a factual, not legal one, concerning whether Defendant Walker was motivated to act, be it out of agreement or gratitude, by the previous actions of Defendants.

Membership in Conspiracy

Plaintiffs allege that Defendant Ayres participated in a conspiracy with Defendant Walker to deprive them of their right to a fair trial. Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint-actor with the judge. *Dennis v. Sparks*, 449 U.S. 24, 28 (1980). More than a blanket of accusation is necessary to support a § 1983 claim. *Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Cir. 1982).

Thus, Plaintiffs must show by competent summary judgment evidence that Defendant Ayres' participated in an agreement to get the state court case improperly brought before Defendant Walker, or, once before him, agree to induce the judge to improperly rule.

Defendant provides an affidavit from an employee of the Dallas County District Clerk's Office present at the filing of the case in 1982. Martin Affidavit, Defendant's Exhibit 5. She attests that the case was "assigned to the 162nd Judicial District court solely by means of the random mechanical filing system then in use in the District Clerk's Office on May 26, 1982". Affidavit at 3. She further swears that no one tried to have her file the case in Defendant Walker's court. Plaintiffs attempt to rebut this with an affidavit from Burks Wylie, an employee of the Dallas County Auditor's office, describing an Administrative Order announcing the adoption of a new computerized filing system in June of 1982. Plaintiffs' Exhibit 1. The adoption of a random computerized system does not contradict the previous existence of a random "mechanical" system, as Defendant states.

Plaintiffs further present excerpts from depositions concerning widespread rumors of potential for forum shopping. Plaintiffs' Exhibit 2 contains only the grossest forms of hearsay, as Plaintiffs concede. *See* Plaintiffs' Reply to Motion to Strike,

filed March 5, 1985. Assuming that the deponent in Exhibit 3, Judge Snodgrass can somehow be qualified as an expert in docket control, as Plaintiffs argue, his testimony only states that there were rumors regarding forum-shopping in the 1970's and that an investigation failed to confirm the rumors. This evidence is insufficient to raise a fact issue concerning the filing of the case.

Turning to the events after the assignment of the case to Judge Walker, Plaintiffs base the inference of a conspiratorial agreement on the following:

> 1. Defendants Ayres, Kelsoe, Walker and former Defendant Musselwhite, attorney for the APP entities, met in Judge Walker's chambers immediately following filing of the suit. Albright Affidavit at 3, Plaintiffs' Exhibit 17. Albright concluded that this meeting concerned the merits of the case, because Walker greeted Albright, attorney for Humble, with the *sua sponte* proclamation, "Is this the man with the 8 million dollars?" Plaintiffs' Response at 10.
>
> 2. Defendants Ayres, Kelsoe and Walker conducted regular *ex parte* meetings with Defendant Walker before the beginning of trial, at noon, and at the end of the day, to which Plaintiffs' counsel were not invited. Bickel Affidavit, Plaintiffs' Exhibit 19; Albright Affidavit; Plaintiffs' Response at 16.
>
> 3. On the morning of August 16, 1982, Defendants Walker, Ayres, Hurt and Sessions met to discuss the special issues to be submitted to the jury. Hughes Affidavit, Plaintiffs' Exhibit 29.

Defendant, despite his affidavit to the contrary, acknowledges that there may be a question of fact regarding *ex parte* meetings. Response at A-8. He argues that there is no evidence

that counsel for Humble or Holloway were excluded from any such meetings if they had chosen to attend, as the meetings often appeared to be in plain view of Plaintiffs' counsel. Defendant further states that Plaintiffs' counsel frequently and voluntarily absented themselves from the proceedings. Defendant's Exhibit 4 at 8. Given the frequency of *ex parte* meetings alleged, there is indeed a fact question on the nature of these meetings.

Defendant argues that even accepting the existence of the *ex parte* meetings, they are insufficient as a matter of law to substantiate a conspiratorial agreement. He cites *Schaffer* v. *Cook*, 634 F.2d 1259, 1260 (10th Cir. 1980), where the court held insufficient an allegation that the Plaintiff saw one of the attorneys speak with the judge in the courthouse before each hearing. The court stated, "Nothing in the complaint indicates that the court or the attorneys were acting outside of the confines of the neutral function of a judicial forum." *Id.* The mere allegation of an occurrence of an *ex parte* meeting is indeed insufficient to raise a fact issue of an impropriety occurring during them. *San Filippo v. U.S. Trust Co. of New York, Inc.*, 737 F.2d 246, 256 (2d Cir. 1984). The presence of Defendant Ayres at an *ex parte* meeting at which Defendant Walker announced the decision to submit jury issues on "our" theory of the case goes beyond these precedents.

This factual issue, on a question sufficient to support an inference of a conspiratorial agreement, precludes the grant of summary judgment on the substantive due process claim as to Defendant Ayres.[3]

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[3] It appears that Plaintiffs also argue that the acts of co-conspirators can be imputed to show Defendant Ayres' agreement. The vicarious liability cannot be so extended; it only governs the fixing of liability once one's membership in the conspiracy is proven.

Subject Matter Jurisdiction

Defendant Ayres' reasserts the contention that a federal court lacks subject matter jurisdiction to, in effect, review the legal determinations of a state court.

In ruling on the various motions to dismiss, this Court relied on *Patsy, supra*, holding that because the alleged harms resulted not from the judicial decision-making functions of the state court, but from alleged improprieties in the conduct of judicial personnel and others, jurisdiction was proper.

Subsequent to this ruling, the Court's attention has been drawn to United States Supreme Court's clarification of this principle. In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), a § 1983 due process case brought by an attorney denied permission to practice before the D.C. Court of Appeals, the Court stated that a federal district court "has no authority to review final judgments of a state court in judicial proceedings". 103 S.Ct. at 1315. Rejecting the proposition that a constitutional complaint necessarily evades this principle, the Court stated:

> If the constitutional claims presented to a United States District Court are inextricably intertwined with a state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.

Id. at 1315 n.16.

In *Hagerty v. Succession of Clement*, 749 F.2d 217 (5th Cir. 1984), the plaintiff, an unsuccessful challenger to a will in a state court probate suit, brought a § 1983 action against the estate, the executor of the will, the state trial judge, and the

clerk of the court, alleging that the state proceedings and the various actions of the trial judge had deprived him of property without due process of law. The Fifth Circuit affirmed the district court's dismissal under Rule 12(b)(1). The court stated:

> The constitutional claims presented by Hagerty to the federal district court, if not identical, were "inextricably intertwined with the state court's denial" of relief; therefore the district court could not have properly reviewed the state court decision. [citing *Feldman*]. To the extent that there was any constitutional error in the Louisiana state court decision, sole recourse for Hagerty was to the United States Supreme Court, not to the federal district court.

Defendant argues that in order to grant Plaintiffs all or any part of the relief sought, "the court will be obliged to decide matters of fact and/or law which have previously been decided, adverse to the Plaintiffs' claims in the state courts, and to judge for itself the ultimate correctness, intent or validity of the state courts' actions and decisions." Response at 19.

Plaintiffs respond that the primary relief sought is not to remand or reverse the state judgment, but to redress Plaintiffs monetarily and punish the conspirators for actions beyond the wrongful procurement of the state judgment. They state that "the merits of the state court proceedings are not at issue in this case" and that "a substantive appellate review of the correctness of various rulings made by Judge Walker" will not be required. Response to Reply at 11.

The Court accepts most of what both parties argue. Plaintiffs may be entitled to recover damages for the deprivation of their right to a fair trial. These damages would most likely be nominal, and would not include the value of the judgment awarded against them. *Carey v. Piphus*, 435 U.S. 247 (1978). To prevail

on this theory, Plaintiffs must factually and legally prove that an unfair trial was received *without regard to the validity* of Judge Walker's legal rulings and the outcome of the trial.[4] This limitation is mandated by and consistent with *Feldman, Hagerty* and the intent of this Court's earlier ruling on this issue.[5]

Although such erroneous rulings, according to Plaintiffs' theory, may be probative of the implementation of the alleged agreement to deprive Plaintiffs of their right to a fair trial, their constitutional significance is most certainly and indisputably intertwined with the state court's denial of relief. *Hagerty, supra.*

To grant much of Plaintiffs' requested relief, both legal and equitable, this Court would have to examine Judge Walker's rulings to determine which were harmless and which were reversible, causing damage. Such a review is forbidden.

The Court believes that this inquiry is not necessarily preempted by Judge Rolston's denial of Plaintiffs' motion to recuse Judge Walker. The Court is not being asked to provide relief that Judge Rolston denied. Denial of a motion to recuse in July of 1982 is not inconsistent with acts amounting to a denial of a fair trial in August. The distinction is between the existence of grounds for disqualification and actual demonstrated bias.

The Court, however, deems the application of collateral estoppel on issues determined by the recusal motion to be appropriate if and when the state court judgment becomes final. *See Archer v. Bill Pearl Drilling Co., Inc.*, 655 S.W.2d 338 (Tex.Civ.App. — San Antonio 1983, writ dism.).

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[4] Given this limitation, it may be substantially easier to prove the conspiracy to deprive than the deprivation itself.

[5] At this and other points, it is worth noting that state courts have jurisdiction to hear Section 1983 cases. *Sullivan v. University Interscholastic League*, 616 S.W.2d 170 (Tex.Civ.App. 1981). The same federalism-based limitations may not be present.

Conclusion

The Court is of the opinion that Defendant Ayres' Motion for Summary Judgment should be, and hereby is, GRANTED with respect to Plaintiffs' procedural due process claims and DENIED in all other respects.

SO ORDERED.
DATED: March 11, 1985.

/s/_____
BAREFOOT SANDERS
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

PAT S. HOLLOWAY, Individually et al.	*	
Plaintiffs	*	Civil Action
v.	*	No. 3-82-1846-H
JUDGE DEE BROWN WALKER, et al.	*	
Defendants	*	Filed June 20, 1985

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendant APP Entities' Motion for Attorneys' Fees, filed May 17, 1985; Plaintiffs' Response, filed June 10, 1985; Defendant Kelsoe's Motion for Attorneys' Fees, filed May 21, 1985; Plaintiffs' Response, filed June 12, 1985; Defendant John Wright's Motion for Attorney Fees, filed May 21, 1985; Plaintiffs' Response, filed June 12, 1985; Judge Dee Brown Walker's Motion for Attorneys' Fees, filed May 23, 1985; Plaintiffs' Response, filed June 12, 1985; and Motion of HECI Exploration Company, Inc., and Sterling Pipeline Company for Bifurcation of Issues of Attorney's Fees, filed June 7, 1985.

On April 23, 1985, this Court entered a judgment in favor of all of the Defendants in this action brought under 42 U.S.C. § 1983. The basis of the Court's holding was that Plaintiffs had failed to articulate a tenable due process claim pursuant to recent developments in the case law of "adequacy of state

remedy". This judgment has been appealed to the United States Court of Appeals for the Fifth Circuit.

Title 42, Section 1988, provides:

> [T]he Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Several Defendants have moved for attorneys' fees under this provision. This section has been interpreted to provide for the recovery of costs by a prevailing defendant when a plaintiff maintains an unfounded action in bad faith, vexatiously, wantonly, or for oppressive reasons. *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631, 636-37 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971). *See also Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

In applying this test, the Court must not engage in *post hoc* reasoning; the reasonableness of a plaintiff's claim must be assessed as of the time the suit was filed. The test is *not* whether the claim was ultimately successful. *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1141 (5th Cir. 1983).

By this standard, the Court can find no basis for the award of attorneys' fees. All Defendants filed motions to dismiss Plaintiffs' complaint. Each motion was denied by the Court based upon an application of then-existing precedent. Much discovery was done and several summary judgment motions were filed. Only with respect to one set of Defendants (the so-called "Browning Interests") did the Court find the factual basis of the action to be inadequate. The final disposition of the case came only after extensive briefing and, indeed, one motion for reconsideration addressed to the application of the recent Supreme Court decision in *Hudson v. Palmer*, 104 S.Ct. 3194 (1984). *Hudson* marked a clear extension of prior law, requiring the consideration of the adequacy and availability of

state law remedies in instances of alleged violations of procedural due process. *Compare McCrae v. Hankins,* 720 F.2d 863 (5th Cir. 1984). This evolution of the law was the sole basis for the disposition of this action with respect to the moving Defendants and is an insufficient basis to find frivolity. *Reineman v. Valley View Comp. School District,* 539 F.Supp. 876, 877 (N.D.Ill. 1982). Shifting several hundred thousand dollars of attorneys' fees would serve only to freeze potentially meritorious civil rights actions in their tracks.

This action has been difficult to resolve, both for the parties and the Court. It may be still years removed from its conclusion. Accordingly, the Court is of the opinion that Defendants' Motions for Attorneys' Fees should be, and hereby are, DENIED.

SO ORDERED.
DATED: June 20, 1985.

/s/_____
BAREFOOT SANDERS
UNITED STATES
DISTRICT JUDGE

APPENDIX E

Pat S. HOLLOWAY, et al.,
Plaintiffs-Appellees,

v.

Judge Dee Brown WALKER, et al.,
Defendants,

Judge Dee Brown Walker,
Defendant-Appellant.

No. 84-1772.

United States Court of Appeals,
Fifth Circuit.

July 18, 1985.

Rehearing and Rehearing En Banc
Denied Sept. 4, 1985.

Appeal from the United States District Court for the Northern District of Texas.

Before JOHNSON, JOLLY and HILL, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This interlocutory appeal presents questions relating to the asserted defense of judicial immunity. Texas Judge Dee Brown Walker and other defendants are alleged to have seized control of Humble Oil pursuant to a conspiracy to deprive the legitimate owners of Humble of their property without due process of law.

The appellee and others brought suit for damages and equitable relief under 42 U.S.C. § 1983, charging that Walker abused his office by imposing a receivership on Humble, appointing an incompetent administrator, and largely wrecking the corporation in accordance with the aims of the conspiracy. Walker moved to dismiss all claims against him, arguing that the plaintiffs had failed to present allegations sufficient to warrant injunctive relief and, in addition, arguing that his judicial immunity bars this suit. The district court dismissed Walker's motion. Because we find the order denying immunity from damages is an appealable order, and that Walker is entitled to the protection of absolute judicial immunity from damages in this case, we reverse the district court, and order the dismissal of the damages action against him. Moreover, we dismiss all pendent state law claims on eleventh amendment grounds. We find no other appealable order in this case, and accordingly dismiss the remainder of the appeal.

I

In reviewing this order denying dismissal, we do not go outside the pleadings. We accept all well pleaded facts as true and view them in the light most favorable to the plaintiff. *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 500 (5th Cir. 1982). We cannot order a dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80, 84 (1957); *Cook & Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505, 506 (5th Cir. 1971).

II

The complicated history of this case begins on September 12, 1979 when the Brownings, defendants in the present case,

filed suit against Humble, Holloway and others in the 193rd Judicial District Court of Dallas County, Texas, seeking, as the alleged equitable owners of substantially all of the assets of Humble and Holloway, the imposition of a constructive trust on Humble's and Holloway's assets, actual and exemplary damages, and the appointment of an interim receiver to manage the disputed assets. Sterling Pipeline Company was later added to the case. (The lawsuit is hereinafter referred to as the "1979 case.") On November 19, 1979, Humble and Holloway filed Chapter 11 voluntary bankruptcy petitions and removed the 1979 case to the United States District of Texas, pursuant to 28 U.S.C. § 1478(a).

The parties entered a "Stipulation and Agreement on Manner in Which Controversy Shall Be Heard, Determined and Liquidated," which was approved by the bankruptcy court and annexed to the court's January 18, 1980 "Order Remanding Causes of Action and Modifying Automatic Stay." The remand order remanded the 1979 case to the 193rd Judicial District Court pursuant to the terms of the stipulation and agreement, and modified the automatic stay to permit trial of the case upon remand, subject to the terms of the stipulation and agreement. The stipulation and agreement provided, among other things, that upon remand of the case the parties would request the presiding judge of the administrative judicial district to assign a visiting or retired state judge to hear the consolidated cases.

The case was remanded and the presiding judge assigned it to a retired state judge who ordered enforcement of a prior settlement agreement. In 1981, the Court of Appeals for the Fifth Supreme Judicial District of Texas (the "Texas court of appeals") reversed the order enforcing the settlement agreement and remanded the case for a jury trial. The Texas Supreme Court found no reversible error. Upon remand from the state appellate courts, the 1979 case was assigned to a different retired

state judge who entered an order nullifying the prior settlement agreement.

On May 26, 1982, a group of investors sued Holloway and Humble in the 162nd Judicial District Court of Dallas County, Texas, Judge Dee Brown Walker presiding, claiming that Humble had wrongfully shut-in over 150 oil and gas wells jointly owned by the investors and Humble. This suit is alleged by Holloway to have been brought pursuant to the conspiracy, solely for the purpose of creating a case before Walker into which the 1979 action could be consolidated, in violation of the agreement that restricted the judge who could hear the 1979 action to one who had retired or was visiting the judicial district. The investors sought the appointment of a receiver over Humble's assets. (The case is hereinafter referred to as the "1982 case.") The Brownings were named as defendants in the 1982 case because of their claim to ownership of Humble's and Holloway's assets. The 1982 case was removed to the bankruptcy court and remanded to Judge Walker's court on the same day.

On May 28, 1982, Judge Walker appointed a receiver in the 1982 case over Humble's and Holloway's assets. Thereafter "ensued a somewhat dizzying sequence of state court orders," most of which were issued by Judge Walker, and recounted in *Browning v. Navarro*, 37 B.R. 201, 205-06 (D.C.N.D. Tex. 1983), which resulted in the transfer and consolidation of the 1979 case into the 1982 case before Judge Walker in the 162nd Judicial District Court. On June 24, 1982, the May 28, 1982 receivership order having been vacated by the state court of appeals,[1] Judge Walker granted the Brownings' request for a separate and expedited trial of the 1979 case. On August 26, 1982, after a month-long trial, judgment was entered in the

[1] *Humble Exploration Co. v. Fairway Land Co.*, 641 S.W.2d 934 (Tex.App. — Dallas 1982 writ ref'd n.r.e.) *enforced*, 641 S.W.2d 941 (Tex.App.—Dallas 1982, no writ).

1979 case for the Brownings, imposing a constructive trust on Humble's and Holloway's assets and awarding the Brownings actual damages of $72,000,000 and exemplary damages of $10,000,000.

On November 18, 1982, Holloway and Humble brought the action in which the present appeal is taken (the "civil rights case") against Judge Walker, the Brownings, legal counsel for the Brownings and many others, alleging that all the defendants had conspired to violate Holloway's and Humble's civil rights in the 1979 case. The complaint alleges that Walker and the other defendants conspired to seize control of Humble through the abuse of Walker's judicial office. Holloway contends that pursuant to the conspiracy Walker arranged to have the 1982 case brought before his court contrary to the usual procedure for assigning cases, that Walker thereafter arranged to have the 1979 and the 1982 cases consolidated in his court, that he imposed receiverships on Humble's and Holloway's assets, defied a mandamus order of the Texas Court of Appeals to refrain from interfering in Humble's business, appointed an incompetent receiver for Humble, dismissed many Humble personnel, posted guards at Humble's headquarters to seize the building, and, in a hotel near the courthouse, conducted meetings regarding Humble's business, all in furtherance of the conspiracy. Holloway contends extensive damage was done to him and Humble through Walker's pernicious actions. Holloway's complaint, broadly construed, may be interpreted to allege that Walker may have acted pursuant to a bribe, although the complaint does not use that word. Accordingly, we will treat the complaint as alleging both bribery and conspiracy.

Holloway's complaint request damages as well as equitable and declaratory relief under section 1983. In addition, Holloway requests similar relief under Texas state law.

After Holloway and Humble filed the civil rights case they perfected an appeal from the judgment in the 1979 case to the

Texas court of appeals. The Texas court of appeals was the appropriate Texas appellate court to hear the appeal of a case from Judge Walker's court. However, neither Humble nor Holloway posted a supersedeas bond to stay execution of the judgment in the 1979 case pending their appeal.

The Brownings then brought an action in the United States District Court (the "turnover action") to obtain possession of Holloway's and Humble's assets which, according to the judgment in the 1979 case, were being held for their benefit. Humble, Holloway and their trustee, Don Navarro, refused to turn the assets over to the Brownings. They argued that the proceedings before Judge Walker, an active judge, were void because the 1979 case was tried in contravention of the bankruptcy court's original remand order. The United States District Court granted a summary judgment in favor of Navarro and held that the trial of the 1979 case before Judge Walker was void. This court, however, reversed the district court's determinations and held that the trial before Judge Walker was not void because the remand order had been satisfied. *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984).

The appeal of the 1979 case was pending in the Texas court of appeals while the turnover action was being litigated in the United States District Court. The Texas court of appeals, however, believed that the turnover action constituted a collateral attack on Judge Walker's judgment in the 1979 case. Therefore, the Texas court of appeals dismissed Humble's and Holloway's appeal[2] because it did not believe Humble and Holloway were entitled to two appeals from the judgment in the 1979 case. However, following this court's reversal of the district court's decision in the turnover action, the Texas court of appeals vacated its prior order dismissing the appeal of the 1979 case.

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[2] *Humble Exploration Co. v. Browning*, 677 S.W.2d 111 (Tex.App.—Dallas, 1984, no writ).

From the appellate briefs before us, it appears the appeal of the 1979 action is now pending before the Texas courts, although the status of that appeal is not material to our decision in this case.

On December 8, 1982 Judge Walker filed a motion to dismiss the civil rights case based upon the doctrine of judicial immunity and the district court's lack of subject matter jurisdiction. On August 21, 1984 the district court entered its order denying Judge Walker's motion to dismiss. Thereafter, on October 16, 1984, the district court refused to amend its August 21 order to provide for an interlocutory appeal under 28 U.S.C. § 1292(b). Notwithstanding the district court's refusal to certify, Judge Walker now appeals the denial of immunity.

III

[1] A threshold issue we must first determine is whether this court has jurisdiction to hear this appeal. Orders denying absolute immunity are automatically appealable under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *Williams v. Collins*, 728 F.2d 721 (5th Cir. 1984). Accordingly, it appears certain that this court has jurisdiction to hear the appeal from the district court's denial of judicial immunity from suit for damages. Holloway, however, denies the appealability of the present order, citing *Collins*:

> We caution that, despite the rule we announce today, many denials of claimed immunity in pretrial proceedings will not be in a posture for appellate review, in that entitlement to immunity *will turn on disputed questions of fact or will otherwise be inextricably bound up with the merits of the claims.*

Collins at 726 n.7 (emphasis supplied). However, taking all well pleaded facts as true, we nevertheless find the complaint is insufficient to avoid Judge Walker's immunity. The caveat of footnote 7 therefore does not apply, and the order denying immunity is appealable.

IV

A

[2] It is a well established rule that where a judge's absolute immunity would protect him from liability for the performance of particular acts, mere allegations that he performed those acts pursuant to a bribe or conspiracy will not be sufficient to avoid the immunity. *Sparks v. Duval Ranch Co.*, 604 F.2d 976 (5th Cir. 1979) (en banc), *aff'd sub nom. Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). In *Sparks* we said:

> The material allegations in this case are . . . that [the] state judge . . . conspired with the four private defendants to deprive the plaintiffs of their oil production. This the judge did by entering an injunction, within his judicial powers to grant, prohibiting plaintiffs from producing certain oil. It is claimed that one of the defendants . . . bribed him to do this, while the other two, in knowing furtherance of the conspiracy, acted as sureties for the injunction bond. [The state judge] was, of course, unqualifiedly immune from suit for the damages occasioned by his judicial act, and as to him the suit was correctly dismissed.

Sparks at 978.

[3] The Supreme Court affirmed this court's holding: "As the case comes to us, the judge has been properly dismissed from the suit on immunity grounds." 101 S.Ct. at 186. Notwithstanding *Sparks*, Holloway strongly contends that the acts of conspiring and taking a bribe are not "judicial acts" even when directed at inducing a judge to take action for which he is entitled to absolute immunity. Holloway relies on *Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980), as support, noting that judicial immunity extends only to "judicial acts" performed without "a clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 1105-07, 55 L.Ed.2d 331 (1978). The *Rankin* court "conclud[ed] that a judge's private prior agreement to decide in favor of one party is not a judicial act," 633 F.2d at 847, and, accordingly, denied immunity for damages resulting from a decision predicated on such a prior agreement. This court does not follow *Rankin*; rather, we defer to the Supreme Court and our own en banc decision. Moreover, even if this were a case of first impression, we would decline to follow the Ninth Circuit's path simply because this aspect of *Rankin* is inconsistent with the fundamental policies underlying judicial immunity.

Among the first cases incorporating judicial immunity into federal jurisprudence was *Bradley v. Fisher*, 13 Wall. 335, 20 L.Ed. 646 (1872), which identified five reasons for immunity: first, and most important, a judge must be free to act upon his own convictions, without apprehension of personal consequences to himself; second, the controversiality and importance of the competing interests in contest before a court make it likely that the inevitable losing party may be overly willing to ascribe malevolent motives to the judge; third, judges faced with the prospect of damages actions would be driven to wasteful and distractive self-protection devices, such as excessive record-keeping; fourth, alternative remedies such as appeal and impeachment reduce the need for private rights of action

against judges; and, fifth, the ease of alleging bad faith would make a qualified "good faith" immunity virtually worthless. *Bradley*, 13 Wall. at 347-54. These factors retain their vitality today. *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 2912, 57 L.Ed.2d 895 (1978). To them one may add the need for finality of judgment.

There is little question that each of the *Bradley* factors applies as forcefully in cases, such as this one, involving allegations of conspiracy or bribery as to cases involving allegations of judicial "bad faith." It requires little skill or imagination to convert many allegations that a judge has ruled in "bad faith" into allegations that he conspired to do so or was bribed; thus, the threat to disinterested decision-making is similar. An embittered, losing party is just as likely to allege bribery or conspiracy as any other malevolent motive of a judge. The possibility that judges will be driven to wasteful and distracting self-protective measures is just as great where liability could flow from conspiracy or bribery charges as from a charge of "bad faith." The same alternative remedies of appeal and impeachment (and in Texas, recourse to the voters) are available where the judge was bribed to commit an unsavory act or conspired to commit the act as where he simply commits acts in "bad faith." Finally, the threat to the finality of decision-making is the same where one alleges a judge conspired or was bribed to abuse his office as where one alleges he abused it in "bad faith." In summary, the need for a private right of action against a judge is no greater and the threat to the independence of judicial decision-making is no less where the allegations are of conspiracy or bribery than where the allegations are of bad faith, personal interest or outright malevolence. Thus, where the alleged harm, though resulting from a bribe or conspiracy, was inflicted by acts to which absolute immunity would apply, the complaint is insufficient to avoid judicial immunity. Accordingly, the complaint in the present case is

sufficient to avoid Judge Walker's absolute immunity only if it alleges harm that did not result from the acts to which his immunity applies, and this it fails to do.

B

[4] All of the harms Judge Walker is claimed to have caused are alleged to have been perpetrated by him through judicial acts not performed in the clear absence of all jurisdiction; accordingly Judge Walker's immunity bars a damages claim against him for these harms.

The complaint alleges that Judge Walker arranged to have cases brought in his court, placed the Humble Oil Company into receivership, discharged many of its key employees, posted in its corporate headquarters guards who intimidated and frightened its personnel, seized control of all of its stock, and appointed an incompetent receiver for the company. The complaints further allege that many of these acts were committed in open defiance of a proscriptive writ of the Texas Court of Appeals ordering him to desist from interference in the affairs of the Humble Corporation. Holloway urges that this proscriptive writ clearly deprived Walker of all jurisdiction and thus stripped him of judicial immunity from liability for these acts. We do not agree.

Judicial immunity does not extend to acts committed with a clear absence of all jurisdiction. However, the term "jurisdiction" is to be broadly construed to effectuate the policies of guaranteeing a disinterested and independent judicial decision-making process. *Stump v. Sparkman*, 98 S.Ct. at 1005. Where a judge does not clearly lack all subject-matter jurisdiction, he does not clearly lack *all* jurisdiction, and "the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for

the same reasons." *Bradley*, 13 Wall. at 352.[3] Judge Walker's was a court of general jurisdiction under Texas law; there is no question that he was generally empowered to conduct proceedings of the sort he conducted. "[I]n our view, it is . . . significant that there was no . . . statute and no case law . . . prohibiting . . . a court of general jurisdiction, from considering a petition of this kind." *Stump*, 98 S.Ct. at 1105.

Holloway argues that the Texas Court of Appeals clearly deprived Walker of all jurisdiction with its writ of prohibition, which ordered Walker to desist from interfering in the affairs of the Humble Corporation. In response, Walker argues that the prohibition order did not obviously apply to his orders promulgated in accordance with his court's control of the Humble stock owned by Holloway, but only to orders concerning Humble which were promulgated pursuant to the Humble corporate receivership. Whatever the merits of Walker's argument, it is indisputable that the prohibition did not purport to determine that Walker's court was without general subject-matter jurisdiction. Indeed, the Texas Court of Appeals did *not* characterize its writ as a determination that Judge Walker was without all subject-matter jurisdiction; rather, the Texas Court of Appeals noted that Judge Walker's court did have subject-matter jurisdiction, but that he was acting in excess of that jurisdiction in continuing to conduct proceedings in the face of an effective order to desist: "*If our order became effective immediately, . . . then* the trial court was without jurisdiction." *Humble Exploration Co. v. Walker*, 641 S.W.2d 941, 943 (Tex.App.—Dallas 1982, no writ). The prohibition order in this case did not even suggest, much less expressly determine, a clear absence of all subject-matter jurisdiction; accordingly, he had sufficient jurisdiction for section 1983 immunity pur-

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[3] *Rankin* appears to misinterpret fundamentally this quoted language.

poses, even if he was without sufficient jurisdiction to conduct proceedings under Texas law.[4]

Nor is Walker alleged to have caused harm through acts other than the misuse of his court's power to issue injunctions and place the parties before him into receivership. But for those obviously "judicial acts," none of the harm Walker is alleged to have caused would have come about. As noted above, it is irrelevant that Walker is alleged to have performed those acts pursuant to a bribe or a conspiracy; they remain "judicial acts."

[5] Holloway argues that many of Walker's acts were not "judicial" because they were performed outside the courtroom[5] and that Walker eventually came to act more like the chief executive officer of the Humble corporation than like a judge. Holloway cites the four factors set out in *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972) as relevant to the determination of whether an act is "judicial": (1) whether the precise act complained of was a normal judicial function; (2) whether the events involved occurred in the courtroom or adjunct spaces, such as the judge's chambers; (3) whether the controversy centered around a case then pending before the judge; and (4) whether the act arose directly and immediately out of a visit to the judge in his official capacity. *McAlester* at 1282. As with "jurisdiction," the term "judicial act" must be broadly construed to realize the policies behind immunity; while the

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[4] We do not, of course, intimate that a prohibition order from an intermediate court of appeals would have been alone sufficient to deprive Judge Walker of all jurisdiction for immunity purposes even if the order had clearly stated that his court was without subject matter jurisdiction. It is noteworthy that the Texas Supreme Court does not consider a judge to be exposed to suit under Texas law merely because he would be subject to a mandamus order. *Turner v. Pruitt*, 161 Tex. 532, 342 S.W.2d 422 (1961).

[5] Specifically, Holloway draws attention to meetings among the defendants, held in a hotel near the courthouse and in courthouse hallways, at which Humble's affairs were considered.

four-part *McAlester* test will often suffice to determine that an act is "judicial," it is not the only test, and each of its factors are not to be given equal weight in all cases. For example, in exigent circumstances judges sometimes issue arrest or search warrants in police stations or in their own homes; in such cases, as here, the second *McAlester* factor will be lacking, but the act is obviously "judicial." The Supreme Court has forcefully indicated that the limits of judicial immunity are not to be set by subtle legalistic distinctions; rather, a broad functional approach is required: "Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." *Butz*, 98 S.Ct. at 2913. Even administrative officials acting as judges, often without courtrooms or chambers, and without the technical jurisdictional confines of a state or federal court, nevertheless are protected by absolute judicial immunity. *Id.* The same is true of private arbitrators and other "quasi-judicial" figures. *Austin Municipal Securities, Inc. v. National Ass'n of Securities Dealers, Inc.*, 757 F.2d 676 (5th Cir. 1985). To place too much emphasis on the second *McAlester* factor in this case would be inconsistent with the broad functional approach of *Butz* and its progeny.[6]

The necessary functions of a judge often include administering remedies as much as determining the allocation of rights among the parties. On occasion a judge will find it necessary to administer a business, or a school district, or an entire prison system to effectively remedy a wrong. While the courts have traditionally drawn back from such detailed involvement in the affairs of the parties, that is no reason to deprive a judge of immunity. Texas law concededly allows for judicially imposed and monitored corporate receiverships; thus, Judge Walker's

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[6] In some cases, as where a judge cites a person for contempt of court, the second *McAlester* factor may almost dispositively indicate the act is "judicial."

judicial acts might be alleged to be inappropriate, but cannot be described as nonjudicial. Issuing injunctions and imposing a receivership in a case before the court are acts obviously satisfying factors (1), (3) and (4) of the *McAlester* test. That some of these acts may have occurred outside the courtroom is not particularly important where it is at least arguable that the nature of the remedy — the receiverships — might naturally entail such informal proceedings. Accordingly, we hold that the complaint fails to allege that Judge Walker acted other than in his judicial capacity.

V

Walker also appeals from the district court's denial of his motion to dismiss Holloway's claims for injunctive and declaratory relief. Holloway requests declaratory relief vacating various judgments entered by Walker and an injunction prohibiting Walker from unlawfully interfering with Humble's affairs in the future in either his official or private capacity.

A

[6, 7] Because the denial of a motion to dismiss under Fed. R.Civ.P. 12(b)(6) is not appealable, we must dismiss Walker's appeal from the district court's denial of his motion to dismiss the equitable and declaratory claims brought under section 1983. Judicial immunity does not extend to suits for equitable and declaratory relief under section 1983. *Pulliam v. Allen*, ___ U.S. ___, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984). Accordingly, cases involving claims for equitable and declaratory relief do not implicate the policies underlying *Collins*; that case was bottomed on the need to minimize the possibility that a judge would be needlessly put through a trial on a damages claim that was precluded by judicial immunity.

B

[8, 9] Walker also moved in district court to dismiss the pendent state law claims against him; this motion was also denied. However, a state official is immune from suit in federal court for equitable relief based on state law because the eleventh amendment denies federal courts the jurisdiction to issue such injunctions against state officials. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). Nor does this case fall under the "ultra vires" exception to eleventh amendment immunity. "[A] state officer may be said to act *ultra vires* only when he acts 'without any authority whatever' "; we have already seen that Walker's operative acts were judicial and not committed in the clear absence of all jurisdiction. *Pennhurst*, 104 S.Ct. at 908 n.11. Thus, Walker is immune from suit for equitable relief based on state law.[7]

We therefore hold that Walker is immune from federal suit seeking equitable relief on state law grounds under *Pennhurst*. Accordingly, we reverse the district court and order all pendent state law claims, equitable and declaratory, as well as legal, dismissed.

VI

In this case we have determined that Judge Walker is not alleged to have committed acts which were either not "judicial

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[7] Because the issue of eleventh amendment immunity concerns a vital issue of jurisdiction as much as it concerns immunity, we must consider the question on our own motion. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1102 (5th Cir., 1981); Fed.R.Civ.P. 12(h)(3). "[Eleventh Amendment] limitation . . . may be raised at any point in a proceeding." *Pennhurst*, 104 S.Ct. at 907, n.8.

acts" or "in the clear absence of all jurisdiction," as those terms are used in immunity analyses. We have therefore held that Holloway's claims for section 1983 damages and all of his pendent Texas state law claims must be dismissed on immunity grounds. Finally, we have held that this court is without jurisdiction to hear an interlocutory appeal from the district court's denial of Walker's Rule 12(b)(6) motion to dismiss the equitable and declaratory claims against him brought under section 1983. Accordingly, we reverse the district court on all claims properly before us and dismiss all damage claims and all state law claims against Walker for failure to state a claim upon which relief may be granted. The remainder of the appeal is dismissed.

REVERSED IN PART, DISMISSED IN PART.

JOHNSON, Circuit Judge, dissenting.

I respectfully dissent. Under the current procedural posture of the instant case, the plaintiffs have sufficiently alleged acts committed after the Texas Court of Appeals' mandamus order which were in the "clear absence of all jurisdiction." *See Stump v. Sparkman*, 435 U.S. 349, 357, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331 (1978). Accordingly, I would affirm the district court's interlocutory decision that plaintiffs' cause of action against Judge Walker should not be dismissed on immunity grounds.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PAT S. HOLLOWAY,
Plaintiff-Appellant,

v.

JUDGE DEE BROWN WALKER, et al.,
Defendants-Appellees.

No. 85-1289

OPINION

Filed May 30, 1986

Before: Charles Clark, Chief Judge, Henry A. Politz, and Jerre S. Williams, Circuit Judges.

Appeal from the United States District Court
for the Northern District of Texas
Barefoot Sanders, District Judge, Presiding

ON PETITION FOR REHEARING
(Opinion March 19, 1986, 5th Cir. 1986, 784 F.2d 1294)

OPINION

CHARLES CLARK, Chief Judge:

In his petition for rehearing, appellant Holloway cites authority from several circuits conflicting with the decisions rendered by this court in the present case and in *Collins v. King*, 743 F.2d 248 (5th Cir. 1984). In *Bretz v. Kelmon*, 773 F.2d 1026,

1027 (9th Cir. 1985) (en banc), the plaintiff alleged that police, prosecutors and various personal enemies conspired to falsely accuse and prosecute him for burglary. The court found that *Parratt/Hudson* did not bar the plaintiff's claim for three reasons. First, the court stated that *Parratt* only applies to minor deprivations of liberty or property. Second, the court found that a conspiracy, by definition, cannot be a "random" act within the meaning of *Parratt*. Third, the court concluded that *Logan*, rather than *Parratt*, controls when a plaintiff challenges a "direct abuse of the state process itself." *Id.* at 1031.

[1] We do not agree with the reasoning of the *Bretz* court. Nothing in *Parratt* or *Hudson* suggests that the holdings of these cases are confined to minor deprivations of liberty or property. If the Supreme Court intended these cases to announce a constitutional rule of lex non curat de minimis, it would have said so. *Compare Nickens v. White*, 536 F.2d 802, 803 (8th Cir. 1976) (prisoner's property interest in an office supply catalogue was so minor that confiscation of the catalogue did not implicate his due process rights).

[2] The Ninth Circuit's conclusion that a conspiracy cannot be a random act is also unpersuasive. From the point of view of the state a conspiracy among its employees can indeed be a random act if the state cannot anticipate or control such conduct in advance. *See Hudson v. Palmer*, ___ U.S. ___, 104 S.Ct. 3194, 3203, 82 L.Ed.2d 393 (1984). Of course, a conspiracy is not random from the point of view of the conspirators but this is to say no more than that a conspiracy is an intentional act, rather than a negligent one. The effect of the Ninth Circuit's holding is to revive the intentional/negligent act distinction, rejected in *Hudson*, in another form.

Finally, we decline to follow the view of the Ninth Circuit that *Logan* extends to an illegal conspiracy case. *Logan* did not involve abuse of an established state procedure but rather the operation of an inadequate state procedure. Put another

way, Logan was deprived of due process not because the Commission illegally delayed in acting on his claim but because the established state procedure failed to provide Logan with a remedy to correct the Commission's illegal delay in acting. By contrast, in *Bretz*, as well as in the present case, the plaintiffs had adequate appellate remedies to correct the deprivations caused by the illegal acts of the conspiring parties.

[3] Holloway also cites *Patterson v. Coughlin*, 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 879 (1986), which involved a prisoner who was charged with assault and interference with an employee. Prison officials held a hearing to consider the charges but, in contravention of state law, did not allow the prisoner to call any witnesses. The Court of Appeals reversed the district court's dismissal of Patterson's suit against various prison officials for failure to provide him with a constitutionally adequate predeprivation hearing. The district court had reasoned that because established state procedure provided for such a hearing but was allegedly not followed, no meaningful predeprivation hearing was possible. In reversing, the Court of Appeals reasoned that official conduct could violate a due process liberty interest and that such conduct was actionable under § 1983. The Court rejected the applicability of *Parratt/Hudson* to the case before them holding that whether conduct of a state official was "random" or "unauthorized" for *Parratt/Hudson* purposes must be "viewed from the position of one who possesses the state-delegated authority to grant a hearing when circumstances and the Constitution so require." *Id.* at 892. Since the officials with the power to give Patterson a constitutionally adequate hearing had failed to do so, the Second Circuit found *Parratt/Hudson* inapplicable.

[4] The difficulty with this position is that in *Hudson*, the Supreme Court expressly rejected a similar argument:

> [Respondent] contends that, because an agent of the state who intends to deprive a person of his property

> "*can* provide predeprivation process, then as a matter of due process he must do so." . . . This argument reflects a fundamental misunderstanding of *Parratt*. There we held that postdeprivation procedures satisfy due process because the *state* cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the state is in a position to provide for predeprivation process.

___ U.S. ___, 104 S.Ct. at 3204.

[5] The ability of the individual state employee to provide predeprivation process does not determine whether a due process violation has taken place. When state procedures provide due process and are violated by a random or unauthorized act of a state employee, even a high-ranking state employee. *Parratt/Hudson* establishes that no federal constitutional due process violation has occurred.

[6] While we recognize that the due process clause "requires more than the mere *promulgation* of laws and regulations which, if followed, would preserve the most fundamental of rights," *Patterson, supra,* 761 F.2d at 891, we are not persuaded that this fact requires confining *Parratt/Hudson* to the actions of low level state employees who lack the power to grant a hearing. If laws and regulations providing due process exist in theory but are systematically ignored in fact then clearly a deprivation of liberty or property, though technically unauthorized by these laws, would not be "random." On the other hand, if the state system, by procedure and in ordinary practice, does in fact provide the plaintiff with due process, no violation of the guarantee contained in the national constitution occurs merely because the official who randomly deprives him of liberty or property without the hearing required by state law has

the power to grant such a hearing. In the case at bar, of course, there is no evidence or even suggestion that Texas has merely promulgated rules against judicial bias and conspiracy but in fact condones such behavior; rather, it is clear that any violation of these rules by a Texas judge would be a random act.

Holloway also relies on *Wolfenbarger v. Williams*, 774 F.2d 358 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 1376 (1986). In that case the court found that the district attorney of Commanche County in Oklahoma had established a department-wide policy of summarily seizing allegedly stolen property and of returning this property to the alleged true owner without a hearing. This policy violated established state procedure but the court found that *Parratt/Hudson* did not bar an action by a pawnshop owner for deprivation of property without due process. The court held that a deprivation of property pursuant to a local policy could violate due process even though the policy was contrary to a state law comporting with the requirements of due process. *Id.* at 365. *See Gregory v. Town of Pittsfield*, ___ U.S. ___, 105 S.Ct. 1380, 1382, 84 L.Ed.2d 399 (1985) (O'Connor, J., with whom Brennan, J., and Marshall, J., join dissenting from denial of certiorari) (questioning whether a municipal policy denying constitutionally required procedures comports with the Constitution merely because the policy is contrary to state law).

The *Wolfenbarger* opinion elicited a strong dissent from Judge Seth, who pointed out that from the point of view of the state the actions of the district attorney were random and unauthorized. Since the state was unable to prevent "a public employee [from] directing action contrary to state law in a random way." Judge Seth argued that *Parratt/Hudson* properly applied. *Wolfenbarger, supra*, 774 F.2d at 367 (Seth, J., dissenting).

[7] It is unnecessary for us to consider *Wolfenbarger's* applicability in this circuit for if we agree with the majority

view, the result reached in the present case would remain unchanged. By no stretch of the imagination can Judge Walker's alleged conspiracy with the opposing litigants be considered a "policy" of any kind. *Wolfenbarger* does not support Holloway's position.

The other cases relied upon by Holloway are inapposite. For example, *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), although factually similar to the case at bar, antedated the *Parratt/Hudson* rule entirely and discussed only the issue of whether private parties who conspired with an immune state court judge had acted "under color of state law." Of even less relevance is *Cleveland Board of Education v. Loudermill*, ___ U.S. ___, 105 S.Ct. 1487. ___ L.Ed.2d ___ (1985), which dealt with the question of what predeprivation process is due a public employee who may be terminated only for cause. It was the "established state procedure" itself that was challenged in *Loudermill* and thus the *Parratt/Hudson* rule, which was not mentioned by either the majority or the dissent, clearly did not apply.

[8] Where a state system as a whole provides due process of law, federal constitutional guarantees are not breached merely because some state employee, even a highly-placed one, might engage in tortious conduct either intentionally or negligently. To avoid such needless federal interference and thereby to preserve the balance between the state and federal courts is the important purpose served by the *Parrett/Hudson* doctrine. Logic and prior precedent of this circuit require that we give *Parratt/Hudson* a reading broad enough to effectuate this important purpose. Therefore, we decline to adopt the restrictive interpretations urged by plaintiffs. The petition for rehearing is

DENIED.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1289

D.C. Docket No. CA-3-82-1846-II

PAT S. HOLLOWAY,

Plaintiff-Appellant,

versus

JUDGE DEE BROWN WALKER,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

Before CLARK, Chief Judge, POLITZ, and WILLIAMS,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

March 19, 1986

ISSUED AS MANDATE: JUN 9 1986

FILED
OCT 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-271

In The

Supreme Court of the United States

OCTOBER TERM, 1986

PAT S. HOLLOWAY,
Petitioner,

v.

JUDGE DEE BROWN WALKER, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT WRIGHT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

1. Whether or not the loser of a state court jury trial and the appeals thereof, may obtain review of the state court judgment in a U.S. District Court by bringing suit under 42 U.S.C. § 1983 for an alleged deprivation of procedural due process in the state court trial.

2. Whether or not the *Parratt/Hudson* decisions apply to an alleged denial of procedural due process by a state court judge when the state provides an appellate review process to correct any errors made by the trial judge.

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No. 86-271

In The

Supreme Court of the United States

OCTOBER TERM, 1986

PAT S. HOLLOWAY,

Petitioner,

v.

JUDGE DEE BROWN WALKER, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT WRIGHT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent John Wright respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioner Pat S. Holloway seeking review of the Judgment in the United States Court of Appeals for the Fifth Circuit which affirmed the Judgment of the District Court in this cause.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Constitution, Amendment XIV:

> No State shall . . . deprive any person of life, liberty, or property without due process of law . . .

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

This case has its inception from two consolidated state court cases in which Petitioner Holloway was a Defendant who lost. He appealed from the Judgment against him to the Texas Court of Appeals and lost. He applied to the Texas Supreme Court for a Writ of Error and lost. He applied to this court for a Writ of Certiorari and lost. *Humble Exploration Co. vs. Browning,* 677 S.W. 2d 111 (Tex. App. — Dallas 1984), *opinion on rehearing en banc,* 690 S.W.2d 321 (Tex. App. — Dallas 1985, writ ref'd n.r.e.), *cert. denied,* ___ U.S. ___, 106 S.Ct. 1376 (1985). The case at bar is but one salvo in a relentless collateral attack being waged by Petitioner Holloway against the state court judgment.[1] The

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[1]There have been several other collateral attacks on the state court Judgment. For example, *Gregory, et al., vs. Walker, et al.,* No. CA3-84-0850-H, was filed on May 25, 1984, in the U.S. District Court for the Northern District of Texas. Holloway was a Plaintiff and all Respondents herein were Defendants and the same allegations that are contained in

Respondents in this case are the state trial judge, the Plaintiffs, their attorneys and other participants in the state court case. Respondent Wright was the Court appointed Receiver in the state court case. This suit was brought to have the state court judgment set aside and declared "void and of no force or effect for lack of due process" because the Respondents are all alleged to have conspired against Holloway to "rig" the outcome of the jury trial in violation of 42 U.S.C. § 1983.[2] (A. p. 25).

The Fifth Circuit opinion in this case sets forth a lengthy and accurate summation of facts commencing with the state court litigation; therefore, this summary will be brief and focus only on matters germane to this application for certiorari. *Holloway vs. Walker,* 784 F.2d 1287 (5th Cir. 1986).

The first state court case styled *Browning vs. Holloway,* cause No. 79-9623-I, was filed on September 11, 1979, by the Brownings seeking recovery from Holloway for breach of fiduciary responsibility while he was the Browning family attorney and trustee for the Browning children. On November 19, 1979, Humble and Holloway filed a Chapter 11 Bankruptcy petition and removed the state court case to the

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this suit were set forth as a RICO (18 U.S.C. § 1961) action. The case was dismissed on July 12, 1985, and no appeal was taken. In Cause No. 8066, styled *Jaehne, et al. vs. Starnes, et al.,* filed June 17, 1985, in the 21st Judicial District Court of Lee County, Holloway is one of the Plaintiffs and all Respondents herein with the exception of the APP entities, are Defendants. The vehicle for the collateral attack was a Trespass to Try Title action which also failed. The Supreme Court of Texas held that his case was a collateral attack and as such was impermissible. *Browning vs. Placke,* 698 S.W.2d 362 (Tex. 1985).

[2]Petitioner Holloway has a rather jaundiced view of all members of the judiciary. Judge Walker is not the first judge to fall victim to an accusation of bias and conspiracy from Petitioner Holloway. This accusation has also been levelled at the individual members of the Supreme Court of Texas. *Atchley vs. Greenhill,* 373 F. Supp. 512, affirmed 517 F. 2d 692 (5th Cir. 1975).

U.S. Bankruptcy Court which remanded the case back to state court on January 18, 1980. The second state court case, styled, *Fairway Land Co., et al., vs. Humble Exploration Co. Inc., et al.,* No. 82-5742-I, was filed on May 26, 1982, by a group of investors, including the APP Entities (consisting of the Respondent petroleum companies and partnerships) because Humble had shut-in approximately 150 wells. This suit requested the appointment of a receiver.

The 1979 suit was randomly assigned to Judge Snodgrass and the 1982 suit was randomly assigned by computer to Judge Walker. Judge Walker consolidated the two actions involving Humble and Holloway and appointed John Wright as receiver. Holloway filed a motion for Judge Walker to recuse himself from the case, in which he alleged all the items of bias and conflict of interest contained in this civil rights suit. The motion was heard by a visiting judge and was denied after an extensive evidentiary hearing. The case proceeded to trial before a jury

On November 11, 1982, Judgment was entered granting the Brownings damages from Holloway and a constructive trust over all of the stock of Humble and Sterling Pipeline. Notice of Appeal from the state court judgment was filed on November 24, 1982. This civil rights action was filed on November 18, 1982.

Holloway did not file a supersedeas bond to stay the enforcement of the state court judgment. He converted his Chapter 11 proceeding to a Chapter 7 Bankruptcy proceeding and a Trustee, Don Navarro, was appointed. The trustee refused to turn over the property and the Brownings filed suit to force the trustee to turn over the property. The trustee and Holloway contended that the state court judgment was void for many of the reasons also raised in this case. The U.S. District Court held the state court judgment

was void. The Fifth Circuit reversed and held that the state court proceedings were not void. *Browning vs. Navarro,* 743 F.2d 1069 (5th Cir. 1984).

Holloway's state court appeal proceeded simultaneously with the turnover action in *Browning vs. Navarro* and its appeal in the federal court system. There was nothing "theoretical" about Holloway's opportunity to appeal, nor was the Texas Appellate system "in fact withheld from Holloway," as asserted in the Petition. (Pet. p. 6). Holloway appealed and lost — by his own actions. An understanding of how he lost his state court appeal is helpful since the availability of the appeal is necessary for the application of the *Parratt vs. Taylor,* 451 U.S. 527, 101 S.Ct. 1908 (1981) and the *Hudson vs. Palmer,* 468 U.S. 517, 104 S.Ct. 3194 (1984) holdings.

During the course of Holloway's state court appeal, the U.S. District Court hearing the turnover action held the state court judgment to be void. *Browning vs. Navarro,* No. 83-0380 (N.D. Tex. Dec. 5, 1983). Holloway then moves the state appellate court to abate his appeal to such time as a final decision is rendered in the federal appellate system on the appeal of Judge Sanders' decision that the state court judgment is void. The Brownings move to dismiss the state court appeal since the federal courts appear to be deciding the issue. The Texas Court of Appeals dismisses the appeal, reasoning essentially that Holloway has obtained the relief sought in federal court — i.e. that the state court judgment is void, and continuation of the state court appeal is pointless and expensive:

> Review of the same judgment in both federal and state systems is a twofold hardship that we are unwilling to impose. Nor can we justify proceeding with this appeal

> when the judgment under review has been declared void by the federal courts.

Humble vs. Browning, supra, 677 S.W. at 114.

The Texas Court of Appeals also addressed the merits of Holloway's argument that the Federal Bankruptcy Court provisionally remanded the case and could pull it back from state courts at will — the "remand on a leash" theory. The Texas Court of Appeals notes that the trial court's asserted lack of jurisdiction because of the remand provisions was never presented to the trial judge giving him no opportunity to comply with the remand order. This argument was presented for the first time on appeal. The Court of Appeals accepted the federal court decision stating:

> If this interpretation is upheld, we must recognized it as the applicable federal law, but, as a matter of state law, we are not bound to permit parties to trifle with state courts in this fashion.
>
> . . .
>
> Having thus chosen to speculate on the verdict in a trial before Judge Walker, and having lost, appellants should not be permitted to pursue their appeal in this court, asserting 211 points of error in a brief of more than five hundred pages, while, at the same time advancing their "leash" theory in federal court.

Humble vs. Browning, supra, 677 S.W.2d at 113.

Holloway filed a motion for rehearing of the dismissal of his appeal which was denied on September 7, 1984. On October 1, 1984, he lost in federal court. The Fifth Circuit reversed and held the state court judgment was *not* void. On October 3, 1984, Holloway moved the state appellate court for relief from its Order dismissing the appeal but his request is too late. *Humble vs. Browning, supra,* 690 S.W.2d 321. He applied for a Writ of Error to the Texas Supreme

Court for review of the Court of Appeals dismissal of his appeal, which was refused, and Holloway then applied for a Writ of Certiorari to this Court for review of the state court's dismissal of the appeal, which was also refused. In his Petition for Certiorari, Holloway placed the issues of deprivation of due process and the alleged bias of the trial court judge before this Court.[3] *Humble Exploration Company vs. Browning, supra.* The Texas appellate courts were no more foreclosed to Holloway than the federal appellate system is to an appellant who relies on a theory and loses or who misses a jurisdictional time limit resulting in the dismissal of his appeal. The motion to abate the appeal in the first instance and the decision to file, untimely, for a rehearing were deliberate strategical choices made by Holloway. (A. p. 16).

Also proceeding simultaneously with the state court appeal and the federal turnover action and its appeal, is the present federal court action. All Defendants filed a Motion for Summary Judgment on the grounds that Plaintiffs' pleadings failed to state a cause of action under 42 U.S.C. § 1983 and that the evidence failed to show an issue of fact regarding their alleged involvement in a conspiracy. The

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[3]One of the Questions Presented by Holloway in the Petition for Certiorari (No. 85-1182) was:

> 1. Were Petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the federal Constitution denied when a Texas Court of Appeals dismissed their pending appeal from a judgment rendered against them in the Court of first instance by a biased and corrupted judge following an unfair trial, on the ground that Petitioners forfeited their appeal by unsuccessfully collaterally attacking the validity of the judgment when Respondents sued to enforce it in federal court.

District Court, on reconsideration of Ayres' Motion for Summary Judgment, granted the summary judgment and dismissed Plaintiffs' claims under 42 U.S.C. § 1983 based on this Court's *Parratt/Hudson* decisions. (A. p. 17). Previous to this Order, on March 11, 1985, the District Court entered an Order holding that it did not have subject matter jurisdiction to review the state court judgment, based on this Court's decision in *District of Columbia Court of Appeals vs. Feldman,* 460 U.S. 462, 103 S.Ct. 1303 (1983) (A. p. 36). Having dismissed Plaintiff's petition, the District Court had no need to reach the remaining Motions for Summary Judgment on the issue of alleged involvement in the conspiracy.[4]

Holloway appealed to the Fifth Circuit Court of Appeals which affirmed the District Court's decision to grant summary judgment and dismiss the case. (A. p. 16).

SUMMARY OF THE ARGUMENT

A grant of certiorari to render a decision on the constitutional question presented is wholly unnecessary to the resolution of this case since the District Court did not have subject matter jurisdiction to review a state court case which is "inextricably intertwined" with the 42 U.S.C. § 1983 action. *District of Columbia Court of Appeals vs. Feldman,* 460 U.S. 462, 103 S.Ct. 1303 (1983).

The Fifth Circuit followed this Court's *Parratt/Hudson* decisions to correctly determine that Petitioner failed to state a cause of action under 42 U.S.C. § 1983 based on a

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[4]Prior to its Order of April 18, 1985, dismissing the case, the District Court did not reach the earlier Motion for Summary Judgment filed by the Brownings and entered an Order on March 28, 1985, granting the Brownings summary judgment because "Plaintiffs have not, after years of discovery, produced sufficient evidence of conspiratorial agreement or conduct by the Brownings Interests." (R. p. 1990).

denial of due process since process still existed in the form of an appeal which constituted an adequate post-deprivation remedy. The decision in this case follows the *Parratt/Hudson* cases dealing with when a Section 1983 cause of action exists and it does not conflict with the decision in *Aetna Life Insurance Co. vs. Lavoie,* ___ U.S. ___, 106 S.Ct. 1580 (1986), which is applicable to a direct appeal to the U.S. Supreme Court of a state court judgment on due process grounds.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THIS COURT SHOULD NOT GRANT CERTIORARI TO PASS ON A CONSTITUTIONAL ISSUE WHEN THE COURT OF APPEALS DECISION IS CORRECT FOR NON-CONSTITUTIONAL REASONS AS WELL.

The granting of a Writ of Certiorari in this case would impinge on the deeply rooted doctrine of constitutional adjudication that questions of constitutionality should not be passed on unless such adjudication is unavoidable. *Jean vs. Nelson,* ___ U.S. ___, 105 S.Ct. 2992, 2997 (1985). Adjudication of a constitutional issue is avoidable in this case since the Court of Appeals affirmed the District Court's judgment which, in addition to the *Hudson/Parratt* constitutional reasons, set forth in its Order of March 4, 1985 (A. p. 24), the additional reason for dismissal of the claims of lack of subject matter jurisdiction to review a state court judgment. *District of Columbia Court of Appeals vs. Feldman,* 460 U.S. 462, 103 S.Ct. 1303 (1983). Holloway's Complaint in the District Court sets forth a myriad of the rulings, orders and actions taken by Judge Walker and pleads them to show that the conspiracy actually existed *because* those rulings and orders were improper. The Complaint details every

action taken in the trial, from evidentiary objections through all actions taken during the trial to final judgment. The pleading is replete with allegations such as:

> Walker repeatedly made favorable comments on the law to the jury which were legally *erroneous.* (R. Vol. 10, "A", par. 118, p. 36).
>
> Walker . . . threatened Plaintiff's attorneys with contempt for *no* apparent or *valid reason* (R. Vol. 10, "A", par. 119, p. 37).
>
> . . . Such line of questioning was wholly *irrelevant* to any issue in the case and was *highly prejudicial* to Plaintiffs. (R. Vol. 10, "A", par. 123, p. 37).
>
> . . . Walker's numerous *favorable rulings* on Defendant Brownings issues and instructions amounted to an instructed verdict in their favor. (R. Vol. 10, "A", par. 135, p. 40).
>
> . . . Walker's *adverse* rulings . . . *deprived* them of a meritorious defenses. (R. Vol. 10, "A", p. 136, p. 40).

These are but a few of the "foregoing acts and omission" by which Defendants are accused of violating 42 U.S.C. § 1983. (R. Vol. 10, "A", p. 46). These are the acts which are alleged to have caused the deprivation of property. Were these "acts and omissions" by the trial judge proper or improper under the circumstances of the state court case. This was the question posed to the Texas Court of Appeals *and* posed to District Judge Sanders in the federal court case which is the subject of this Petition for Certiorari. The very acts alleged as evidence and causation of a civil rights deprivation are errors of law raised on appeal. As the District Court pointed out: "Virtually all of these matters, including the allegation of bias, are among the 211 points of

error argued on appeal from the state court trial." The District Court went on to actually correlate the paragraphs of the Complaint to the respective points of error. (A. p. 30).

The U.S. District Court is asked to review not only the propriety of every action taken in the state trial court but is also asked, per force, to review the propriety of the Texas Court of Appeals' dismissal of the appeal which contained points of error that are germane to the federal cause of action. As stated by this Court in *District of Columbia vs. Feldman, supra,* 103 S.Ct. at 1315:

> . . . a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be heard only in this Court.

Holloway sought such a permissible review of the state court judgment by Petition for Writ of Certiorari to this Court but this Court declined to hear his case. Holloway cannot now achieve indirectly what this Court refused to do directly when it denied his Petition for Certiorari. Cloaking a complaint in 18 U.S.C. § 1983 allegations does not circumvent this restriction. *Hagerty vs. Succession of Clement,* 749 F.2d 217 (5th Cir. 1984).

In *Howell vs. State Bar of Texas,* 674 F.2d 1027 (5th Cir. 1982), 460 U.S. 1065, 103 S.Ct. 1515 (1983), opinion on remand 710 F.2d 1075 (5th Cir. 1983), this Court granted certiorari and remanded the case back to the Fifth Circuit for consideration in light of its decision in *Feldman.* The Plaintiff filed a federal court § 1983 action seeking declaratory and injunctive relief from a state bar disciplinary action against him in state district court, alleging that the state bar disciplinary scheme was unconstitutional, per se, and that in his proceeding he was denied the right to a jury as well as

the right to a fair trial. The court upheld the district court's dismissal for want of jurisdiction to all his claims except the direct attack on the constitutionality of the state disciplinary scheme, stating:

> In this instant case, all but one of the constitutional claims Howell presented to the district court are "inextricably intertwined" with the Texas State Court's reprimand of Howell in a judicial proceeding. For example, he alleged that he was deprived of his right to a jury trial as well as his right to a fundamentally fair trial. With respect to these claims, Howell has done nothing more than ask the district court to sit as an appellate court and review the state court judgment. As the Supreme Court has perfunctorily stated, "(t)his the District Court may not do."

Howell, supra, 710 F.2d at 1077.

In the present case, Petitioner Holloway's constitutional claims are so "inextricably intertwined" with the state court proceeding that the District Court is in essence being called upon to review the state court decision — which the District Court may not do. *District of Columbia vs. Feldman, supra,* 103 S.Ct. at 1315 n. 16.

Since the District Court did not have subject matter jurisdiction, regardless of the constitutional claims, this Court need not grant a Writ of Certiorari to review the constitutional issues.

II. THE ISSUES PRESENTED IN THIS CASE ARE CONTROLLED BY THIS COURT'S DECISIONS IN *PARRATT VS. TAYLOR AND HUDSON VS. PALMER.*

The Fifth Circuit correctly applied the decisions in *Parratt vs. Taylor,* 456 U.S. 527, 101 S.Ct. 1908 (1981), and

Hudson vs. Palmer, 468 U.S. 517, 104 S.Ct. 3194 (1984), to determine that there was no denial of due process since process still existed in the form of an appeal; and, therefore, Holloway had failed to establish the requisite deprivation necessary to sustain a 42 U.S.C. § 1983 action.

The holding in *Hudson* is succinct and unambiguous that an intentional deprivation of property by a state actor does not give rise to a violation of the due process clause if the state provides an adequate post deprivation remedy. *Hudson, supra,* 104 S.Ct. at 3204, n. 14.

The instant case meets all elements of the *Hudson* rule and its supporting rationale. The complaint is for alleged violations of procedural due process emanating from the action of the state judge rather than from established state custom, policy or procedure. In fact, the gravamen of the Complaint is that the state judge allegedly did *not* follow authorized state procedures.

This distinction between a deprivation caused by the "random and unauthorized" misconduct of a state actor, as opposed to a deprivation caused by "conduct pursuant to established state procedures", is the basis for the application of the *Parratt* and *Hudson* holdings, as opposed to the holding in *Logan vs. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148 (1982) which makes the availability of a post deprivation remedy irrelevant to the question of whether a deprivation has occurred.

The availability of a state remedy is essential to the determination of whether or not there has been a violation of procedural due process even though it is not a factor in determining the existence of a violation of substantive due process. When the deprivation occurs by official state policy or custom, the substantive due process violation is complete

and the availability of a state remedy is ancillary to a 42 U.S.C. § 1983 action and need not be exhausted prior to bringing a 42 U.S.C. § 1983 action. *Patsy vs. Board of Regents of the State of Florida,* 457 U.S. 496, 102 S.Ct. 2557 (1982). But when procedural due process is involved, the essence of the violation is the lack of procedure and the violation simply does not exist unless the state refuses to provide a suitable post deprivation remedy. *Hudson, supra,* 104 S.Ct. at 3204.

That an impartial and disinterested tribunal is procedural rather than substantive due process is not a new concept espoused for the first time by the Fifth Circuit in this case, rather it is the position of this Court. *Marshall vs. Jerrico,* 446 U.S. 238, 243, 100 S.Ct. 1610, 1613 (1980). Even Professor Tribe places the decision of a neutral and impartial tribunal in his section discussing procedural due process. L. Tribe, *American Constitutional Law,* p. 512, (1978).

In deciding whether the state provided due process, the court need only determine whether the state provided an adequate post-deprivation remedy, not whether the Petitioner made effective use of the state remedy. Furthermore, the available state remedy need not provide all the relief which might be available under 42 U.S.C. § 1983 to be adequate for due process purposes. *Parratt, supra,* 451 U.S. at 543, 101 S.Ct. at 1917. Petitioner cannot create a § 1983 claim by ignoring, waiving or losing his available state remedies by intentional or negligent failure to meet required state procedures as he has done in this case. The appeal available to Petitioner had the potential to restore the entire amount of property of which he was allegedly deprived.

III. THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *AETNA LIFE INS. CO. VS. LAVOIE.*

There is a difference between a direct appeal of a final judgment from the highest state court to the U.S. Supreme Court for review of that judgment to determine if its rendition comports with due process and a suit brought under 42 U.S.C. § 1983 seeking review in a U.S. District Court of the state trial court's judgment and alleging a violation of due process in the rendition of the trial court judgment. That is the difference between this case and *Aetna Life Insurance Co. vs. Lavoie,* ___ U.S. ___, 106 S.Ct. 1580 (1986).

Lavoie involved a direct appeal from a judgment of the Alabama Supreme Court in which one of the Justices had a direct interest in the outcome of the case. A motion for recusal was filed and denied. The decision to recuse was a matter left to the individual justice involved to decide for himself. After reviewing the circumstances of the Justice's involvement and interest in the outcome of the case, this Court vacated the state court judgment because the judge's participation denied the Petitioner due process. Had this Court granted Petitioner Holloway's application for certiorari from the state court case, then that judgment and the allegations of the judge's bias and interest would have been governed by a *Lavoie* analysis. Holloway properly raised the due process constitutional issue at the state level and presented it to this Court for review, which this Court declined to do.

The inquiry necessary to sustain the present § 1983 case is whether or not a deprivation without due process has in fact occurred when an appeal to rectify any error or due process violation is still available — i.e. the *Hudson* inquiry.

Simplistically put, the state is still in the process of providing the process that is due by means of the appeal. Following Petitioner's view of *Lavoie,* every erroneous ruling by a trial judge that implicated the due process clause would give immediate rise to a 42 U.S.C. § 1983 action in federal court. That action would remain viable based solely on the occurrence of an erroneous ruling even though ultimately there was no deprivation of property due to the actual outcome of the case or reversal on appeal. It is only where the state judicial *system* has failed to provide due process that *Lavoie* is controlling. *Lavoie* determines whether the due process clause has been violated whereas *Hudson* determines when a cause of action is stated under 42 U.S.C. § 1983 for a procedural due process violation. Had the biased judge in *Lavoie* been a lower court judge and had the Alabama Supreme Court reversed, there would not have been an appeal to the U.S. Supreme Court, and furthermore there would be no § 1983 action either because of *Hudson.* The constitutional right to a fair trial is secured through the right to appeal in the state court system and through direct review by this Court. The Fifth Circuit has in no way jeopardized this right.

Neither is the Fifth Circuit at odds with *Dennis vs. Sparks,* 449 U.S. 24, 101 S.Ct. 183 (1980), which was a narrow holding that "under color of state law" included those acting in concert with a state judge even though the state judge was immune. It is only by implication, since *Dennis* was a Section 1983 case, that such a complaint was a viable § 1983 action. The issue was never discussed by this Court or any lower court, therefore, there is no conflict with the *Hudson* doctrine as applied to this case. *Dennis* was decided in 1980 and *Hudson* was decided in 1984. Constitutional law is not stagnant, it is a continuously evolving body of law. *Daniel vs. Williams, supra,* decided in 1986, overruled the

entire negligence concept of *Parratt* decided in 1981. Likewise, the Fifth Circuit followed the evolving concept of when state action in regard to due process is complete for purposes of alleging a § 1983 cause of action as set forth in the most recent decision in *Hudson.*

IV. THE FIFTH CIRCUIT CORRECTLY FOLLOWED THE *PARRATT/HUDSON* DECISIONS RATHER THAN DECISIONS OF ANOTHER CIRCUIT.

Conflicts in the holdings between different circuits is an important consideration for a grant of certiorari when this Court has not addressed the issues and needs to resolve the conflicting views. But, certiorari should not be granted when the issue has been decided by this Court and the case up for review has followed the decision of this Court even though another circuit has not. See *National Ass'n of Greeting Card Publications vs. U.S. Postal Services,* 462 U.S. 810, 103 S.Ct. 2717 (1983).

In *Bretz vs. Kelman,* 773 F.2d 1026 (9th Cir. 1985) (en banc), the Plaintiff who was arrested, tried and acquitted of a burglary charge brought a 42 U.S.C. § 1983 action, alleging that the police, prosecutors and witnesses all conspired to deprive the Plaintiff of his liberty. At issue was the arrest allegedly made in bad faith. The Court's decision turned on its own interpretation that *Parratt/Hudson* was restricted to "minor deprivations" of a property interest. To be sure, this Court has not addressed whether *Parratt/Hudson* extends to intentional deprivations of liberty interests as well as of property interests, but there is no limitation of its application to only *minor* property interests.[5]

[5]The negligent/intentional and property/liberty distinctions are receding with each decision of this Court, the most recent of which mooted any necessity to distinguish between a property or liberty interest in regard to

While the Fifth Circuit has applied *Parratt/Hudson* to a liberty interest in *Augustine vs. Doe,* 740 F.2d 322 (5th Cir. 1984), a liberty interest is not at issue in this case and reconciliation of the Circuits' conflict in that regard will have to await another day where a liberty interest case is before this Court.

The *Bretz* court also based its decision on the concept that a conspiracy, because of its intentional and planned aspect, can never be a "random" act. This is totally contrary to the *Hudson* decision which addressed itself specifically to intentional acts of state employees. Finally, the *Bretz* court followed the *Logan* line of cases because it mistakenly believed that *Logan* applied to an abuse of the state process. As the Fifth Circuit pointed out when it declined to follow *Bretz, Logan* addresses itself to a state procedure that is inadequate, per se, not to a state procedure that becomes inadequate because it is not followed or abused. This distinction being the heart of the *Parratt/Hudson* decision.

Patterson vs. Coughlin, 761 F.2d 886 (2d Cir. 1985), *cert. denied,* ___ U.S. ___, 106 S.Ct. 879 (1986), also involved an intentional deprivation of a liberty interest when an inmate was placed in isolation for 65 days pursuant to a hearing in which the hearing officer failed to follow the state's own rules. The Second Circuit declined to follow *Parratt/Hudson* because it held that the deprivation was neither "random" or "unauthorized" when "viewed from the position of one who possesses the state-delegated authority to grant a hearing" *Id.* 761 F.2d at 892. *Hudson* itself refutes such an argument. No act can be "random" or "unauthorized" if viewed through the eyes of the state employee intent on departing

---

a negligent act since the Due Process Clause is no longer implicated at all by negligence. *Daniel vs. Williams,* ___ U.S. ___, 106 S.Ct. 662 (1986).

from state procedure. The act is, however, "random and unauthorized" if viewed through the eyes of the state which has established the procedures. In this case the appellate process was available and ". . . post deprivation procedures satisfy due process because the *State* cannot possibly know in advance of a negligent [intentional] deprivation of property." *Hudson, supra,* 104 S.Ct. at 3204. It is only when state rules are systematically ignored that *Parratt/Hudson* does not apply. This is in keeping with this Court's requirement that for the state, per se, to be liable, the employees' actions must be taken pursuant to an established "policy or custom." *Monell vs. Dept. of Social Services of City of New York,* 436 U.S. 658, 694, 98 S.Ct. 2018, 2037 (1978).

This Court has just refused to review one of the most recent applications of *Parratt/Hudson* to a situation analogous to this case, in which was upheld a dismissal of a 42 U.S.C. § 1983 action against members of the state regulatory commission for malicious abuse of the hearing process. *National Communications Systems, Inc. vs. Michigan Public Service Commission,* 789 F.2d 370 (6th Cir. 1986) *cert. denied* 55 USLW 3235, (U.S. Oct. 6, 1986) (No. 86-138). The Fifth Circuit followed and applied the very heart of the *Parratt/Hudson* decision in this case rather than letting itself be led astray by the *Bretz* and *Patterson* decisions that strain logic to avoid the application of *Parratt/Hudson.*

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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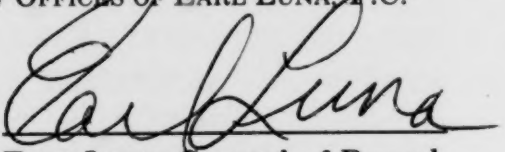
By: 

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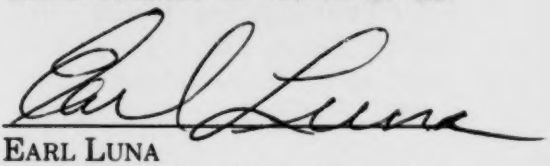
CERTIFICATE OF SERVICE

I, Earl Luna, counsel of record for Respondent John Wright and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of Respondent Wright's Brief in Opposition to Petition for Certiorari on all parties required to be served, by depositing three copies of Respondent Wright's Brief in Opposition to Petition for Certiorari in the United States mail, on this 21st day of October, 1986, with first-class postage, addressed to the listed counsel of record at the address indicated.



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No. 86-271

In The
Supreme Court of the United States
OCTOBER TERM, 1986

PAT S. HOLLOWAY,
Petitioner,
v.
JUDGE DEE BROWN WALKER, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS, THE BROWNING INTERESTS AND R. JACK AYRES, JR.

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QUESTIONS PRESENTED

1. Can an unsuccessful state court defendant obtain a review of the adverse state court proceedings in the district courts of the United States by bringing suit under 42 U.S.C. § 1983 alleging denials of due process?

2. Does the *Parratt-Hudson* rule apply to an alleged denial of due process in a state court trial when the state provided appropriate appellate review procedures?

SUPPLEMENT TO PARTIES TO THE PROCEEDING

In addition to the list of individual defendants listed in the Petition for Writ of Certiorari, Respondent Jane H. Browning was sued individually and as Co-Independent Executrix and Co-Trustee of the Estate of William W. Browning, Jr., Deceased. Respondent Michael G. Starnes was sued individually and as Co-Independent Executor of the Estate of William W. Browning, Jr., Deceased, and as Trustee for Katherine Louise Browning Cook, Averille Adams Browning Dawson, William Webb Browning, III, Winifred Fallon Browning Vaughn, and Robert Holland Browning. Respondent R. Jack Ayres, Jr., was sued individually and as a professional corporation.

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No. 86-271

In The

Supreme Court of the United States

OCTOBER TERM, 1986

PAT S. HOLLOWAY,

Petitioner,

v.

JUDGE DEE BROWN WALKER, et al.,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS, THE BROWNING INTERESTS AND R. JACK AYRES, JR.

The Respondent Browning Interests[1] and R. Jack Ayres, Jr. respectfully request that this Court deny the Petition for Writ of Certiorari of Pat S. Holloway seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit. That court's opinions in this case are reported at 784 F.2d 1287, rehearing denied, 790 F.2d 1170 (5th Cir. 1986).

[1]The Browning Interests are Jane H. Browning, Individually and as Co-Independent Executrix and as Co-Trustee of the Estate of William W. Browning, Jr., Deceased, Michael G. Starnes, Individually and as Co-Independent Executor of the Estate of William W. Browning, Jr., Deceased, and as Trustee for Kathryn Louise Browning Cook, Averille Adams Browning Dawson, William Webb Browning, III, Winifred Fallon Browning Vaughn, and Robert Holland Browning; Catherine Agnes Land Starnes, Individually; Kathryn Louise Browning Cook, Individually; Averille Adams Browning Dawson, Individually; William Web Browning, III, Individually; and Robert Holland Browning, Individually.

JURISDICTION

Petitioner applies for a writ of certiorari to the Court of Appeals for the Fifth Circuit. Federal jurisdiction in this case is lacking because the district court lacked federal subject matter jurisdiction to review rulings and proceedings in the state court.

STATEMENT OF THE CASE

This is the third but, unfortunately, probably not the last, petition for certiorari Petitioner Pat S. Holloway has filed within approximately a one-year period asking this Court to review, either directly or indirectly, the same state court judgment against him.[2] In this case, Holloway seeks the reversal of a summary judgment against him by a United States district court in a § 1983 suit collaterally attacking the state court judgment.[3]

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[2]The Court denied petition for writ of certiorari in Holloway's direct appeal from the state court judgment. *Humble Exploration Company, Inc. v. Browning,* 106 S.Ct. 1376 (1986), *rhg. denied,* 106 S.Ct. 1807 (1986). The Court also denied certiorari in an interlocutory appeal in this case involving Holloway and Judge Walker, one of the defendants. *Holloway v. Walker,* 106 S.Ct. 605 (1985).

[3]The statement of the case presented by the Petitioner has numerous misstatements of the proceedings in both the original state court proceedings, which are the subject of this lawsuit, and the proceedings below in this suit. Petitioner's counsel in this Court did not represent Petitioner in tbe proceedings below, in the original state court suit, or in any of the multiple collateral proceedings, and, therefore, have probably relied upon Petitioner for their assertion of the factual background involved in this case. Many of the misstatements, however, are misstatements that Holloway has repeatedly made both in these proceedings below and in multiple collateral proceedings.

While the Respondents cannot expect Petitioner's current counsel to be knowledgeable about the detailed factual background in the collateral proceedings, Petitioner's counsel should have been able to ascertain that this is an appeal from summary judgment granted by the district court for the Respondents. *Holloway v. Walker,* 784 F.2d at 1290. (Appendix to Petition (hereafter referred to as "Pet. App.") at A-7). Holloway's pleadings are not assumed to be true in an appeal from a summary judgment.

In 1979 the Brownings sued Holloway, Humble Exploration Company, Inc. and others in the state courts of Texas for damages for fraud and breach of fiduciary duties and for imposition of a constructive trust over certain corporate stock and producing mineral interests. Following numerous procedural complications and delays, including the filing of bankruptcy proceedings by Holloway on behalf of Humble and himself as a "technical legal maneuver made only for the purpose of removing to the federal courts [the] lawsuit . . .", the Brownings finally obtained a six and one-half week jury trial, which concluded with multiple jury findings adverse to Holloway. The jury found that the conduct of Holloway and the other defendants damaged the Brownings, awarding actual damages in the amount of $70 Million and punitive damages of $2 Million.[4] Based on the jury's verdict,

[4]Petitioner affirmatively misstates both the jury's findings and the legal effects of those findings under Texas law. On page 4 of the petition, Holloway states that the jury returned a verdict in his favor and that Judge Walker entered a judgment n.o.v. in furtherance of a conspiracy against him. In special issues 2 and 9 the jury found that Holloway violated his fiduciary duties to Browning by acquiring shares of stock in Humble for his own account, and in special issues 12 and 13 found that Holloway defrauded Browning in connection with the acquisition of the stock in question. In special issue 15 the jury found that Pat Holloway and others entered into a conspiracy to defraud the plaintiffs of their rights as shareholders in the company with malice. Holloway repeatedly ignores those findings. Holloway instead claims that in response to special issues 1 and 5, the jury found that he ". . . had *not* agreed to hold the shares of Humble Exploration Company issued in his name for the use and benefit of the Browning Interests . . . and that Holloway had *not* defrauded the Browning Interests. The jury further concluded that the Browning Interests were entitled to no damages whatever. Special Jury Issues Nos. 1, 5, 83." (Petition at 4, n.4) (Holloway's emphasis). Apparently, Petitioner asserts that the jury's failure to find affirmatively for a party on each theory of recovery on which he has the burden of proof is equivalent to a jury finding in favor of his adversary. Stated differently, Petitioner apparently contends that the jury's negative answers to certain special issues is an affirmative finding of the opposite fact. This simply is not the law in Texas. *C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191 (Tex. 1966). The Browning Interests' failure to prevail on some of their claims did not affect the multiple findings in their favor.

and its own additional findings as a matter of law, the trial court entered a judgment granting the Brownings a constructive trust over substantially all of the assets of Holloway and the other defendants and damages totalling $72 Million.[5]

Holloway and the other state court defendants appealed in the state system. However, prior to taking that appeal, Holloway filed this suit on behalf of Humble, Sterling Pipeline Company, another defendant, and himself.[6] This suit was but the first in a litany of collateral attacks by Holloway or his family on the validity of the state court judgment, including a declaratory judgment proceeding,[7] a RICO

[5]Holloway states that the constructive trust has included his residence, his inheritance, and many of his personal effects. (Petition at 4). The Browning Interests have never contended that the constructive trust on Holloway's property extended to his inheritance. With respect to the assets that were covered by the constructive trust, the jury found that Holloway and the other defendants had commingled assets to which the Browning Interests were entitled with their own assets. Under Texas law, a party who wrongfully commingles trust property has the burden of proof to trace and segregate the assets *not* subject to constructive trust. *Eaton v. Husted*, 141 Tex. 349, 172 S.W.2d 493 (1943). Holloway simply failed factually and legally to meet his burden.

[6]Although Holloway and Humble were both in bankruptcy with a bankruptcy trustee appointed over both estates, Holloway filed this lawsuit without obtaining permission of either the bankruptcy trustee or the bankruptcy court. Subsequently, the bankruptcy trustee obtained permission of the bankruptcy court to join Holloway in this suit. While this suit has been on appeal, the bankruptcy trustee obtained permission from the bankruptcy court to withdraw from participation in litigation between Holloway and the Browning Interests and to permit Holloway to pursue whatever legal claims he desires.

[7]Neither the state court defendants nor the bankruptcy trustee for Holloway and Humble filed a supersedeas bond when they appealed the state court judgment. Therefore, the Browning Interests requested that the bankruptcy trustee, Don Navarro, and the defendants voluntarily turn over property belonging to the Browning Interests under the constructive trust. When the request was rejected, the Browning Interests filed a turnover suit in the United States district court, under its bankruptcy jurisdiction, as required by a prior agreement in the bankruptcy court, in order to obtain possession of their property during the pendency of the

case,[8] multiple collateral state attacks,[9] attacks in the

state appeal. In the turnover suit, Holloway and the other defendants therein filed a declaratory judgment proceeding as a counterclaim, asking the United States district court to hold that the remand from the bankruptcy court was not effective, that the state courts lacked jurisdiction of the case, and that the state court judgment was void because Judge Walker was neither a retired nor visiting judge. Holloway's statement in this petition that his position in the turnover suit was merely defensive misstates the record. The filing of a counterclaim is an affirmative, not defensive, action. He sought not only to prevent the Browning Interests from obtaining possession of their property during the appeal of the state court judgment but also to have the state court judgment set aside by the federal courts. *Browning v. Navarro,* 743 F.2d 1069 (5th Cir. 1984).

[8]In May, 1984, Holloway, appearing as an attorney, purportedly on behalf of his daughter and various owners of royalty interests in wells operated by Humble, filed in the United States district court a RICO action against the persons who were defendants in this case. As an attorney in that case, Holloway made the same conspiracy allegations and claimed the defendants had corrupted the 162nd District Court and asked the court to declare the judgment in this case void and enjoin its enforcement. In response to defendants' interrogatories, the plaintiffs answered that they had no personal knowledge of the facts in support of the allegations, that the knowledge was that of their attorney, Holloway, and that his knowledge was privileged as work product. The RICO suit was dismissed with prejudice pursuant to Fed. R. Civ. P. 41(b) in July, 1985.

[9]After receiving adverse rulings in the spring of 1985 in this case, the turnover suit and his direct appeal in the Texas appellate courts, Holloway filed two suits in June and July, 1985, in a Lee County, Texas, district court collaterally attacking the judgment. The suits were practically identical except for a variation of parties. Holloway, members of his immediate family, and former colleagues of Holloway were plaintiffs in the first Lee County suit. Holloway filed the second suit as the attorney for members of his immediate family. Both suits essentially repeated the allegations in this suit, in which summary judgment had already been rendered against him, and added numerous other allegations. Both suits asked the Lee County district court to declare the judgment in this case void, enjoin its enforcement and enjoin the Respondents from complying with the United States district court's subsequent turnover orders in the turnover suit. The Lee County court announced that it would grant a temporary injunction prohibiting the Respondents from receiving any property from the bankruptcy trustee, who in 1985 had been ordered to turn over property to the Respondents. The Lee County court did not sign such an injunction but instead entered an order declaring the judgment in this case void. The Texas Supreme Court stayed the Lee County court's order and subsequently granted a conditional mandamus directing the judge of the Lee County court to vacate his order. *Browning v. Placke,*

bankruptcy court,[10] and even original proceedings in the Fifth Circuit.[11]

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698 S.W.2d 362 (Tex. 1985). These Lee County cases, which were consolidated, were subsequently dismissed for lack of jurisdiction on January 10, 1986. Holloway is currently appealing that dismissal in the Texas appellate courts.

[10]In May, 1986, Holloway filed in the bankruptcy court in his individual bankruptcy case multiple objections to the Browning Interests' claims for payment of some of their damage award out of the assets of the Holloway bankruptcy estate. He repeated the same allegations as presented in this case and the Lee County suits, along with additional arguments and asked the bankruptcy court to hold the state court judgment void. The bankruptcy court denied Holloway's objections. He has appealed the denial to the United States district court, where the appeal is currently pending.

[11]While this case was pending in the Fifth Circuit, Holloway's family and co-counsel in the Lee County cases filed additional collateral attacks against the validity of the state court judgment in the form of original proceedings. These motions asked the Fifth Circuit *sua sponte* to stay orders in the turnover suit and to declare the state court judgment void on the grounds that Holloway had a previously undisclosed diplomatic immunity from suits in Texas courts as a Bolivian consul, and that the state court judgment was obtained in an alleged violation of Holloway's civil rights and related matters. In addition, Holloway's latest wife, herself a convicted felon, stated in her papers to the Fifth Circuit that she had armed herself and threatened to do violence to anyone who attempted to enforce the turnover orders of the United States district court. The Fifth Circuit denied those motions.

Holloway was found by the district court in the turnover suit to be in contempt of court for refusing to obey that court's orders to turnover certain property to the Browning Interests. Holloway then filed an original habeas corpus proceeding in the Fifth Circuit, again attacking the validity of the state court judgment on the basis of his purported diplomatic immunity and multiple other grounds. The Fifth Circuit denied the application. [Appendix A-1]. The Fifth Circuit has also found that Holloway was terminated as an honorary Bolivian consul prior to the state court suit and that he has known of that termination at least since February, 1979. Respondents' suggestion for contempt and disciplinary action based upon the making of fictitious and fraudulent claims before that court and for unethical conduct are being retained by the Fifth Circuit until after this Court rules on this petition for certiorari.

Holloway has repeatedly used this pattern of collateral attacks on state court judgments in the past as an attorney. *See,* note 14, *infra,* and *Atchley v. Greenhill,* 373 F.Supp. 512 (S.D. Tex. 1974), *aff'd,* 517 F.2d 692 (5th Cir. 1975), *cert. denied,* 424 U.S. 915 (1976) (Holloway's claims of corruption by seven then-sitting members of the Texas Supreme Court, two of whom are now judges on the Fifth Circuit, were dismissed by the district court as frivolous and as an improper attempt to review state court proceedings in a lower federal court).

In the turnover suit, Holloway initially succeeded in obtaining a judgment from the United States district court that the state court judgment was void and that the state courts lacked jurisdiction because Judge Walker was neither a retired nor visiting judge.[12] The Texas court of appeals found that Holloway and the other defendants' conduct in the federal court was fundamentally inconsistent with continued simultaneous prosecution of an appeal in the courts of Texas. It, therefore, dismissed the appeal. *Humble Exploration Company v. Browning,* 677 S.W.2d 111 (Tex. App. 1984).[13]

Simultaneous with their state court appeal and their declaratory judgment action in the turnover suit, Holloway, Humble, Sterling and the trustee sought in this suit to obtain the following:

1. a declaratory judgment that the Brownings were completely and conclusively barred from obtaining

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[12]*Browning v. Navarro,* 37 B.R. 201 (N.D. Tex. 1983). The Fifth Circuit subsequently reversed this decision by the district court, holding that the parties had complied with the requirements of presenting the case to a retired or visiting judge upon remand, that the state courts had jurisdiction over the proceedings, and that the state court judgment was not void. *Browning v. Navarro,* 743 F.2d 1069 (5th Cir. 1984). Following remand, the district court rejected further arguments that the state court judgment was void and held that the Browning Interests were entitled to possession of the constructive trust property but denied their conversion claim against the trustee. Holloway is currently appealing that judgment. The Browning Interests are appealing the district court's ruling on conversion.

[13]Holloway subsequently was able to get the panel of the Texas court of appeals to grant an untimely misnomered motion for rehearing and reinstate his appeal. The Texas court of appeals, en banc, set aside the reinstatement for violating the Texas Rules of Civil Procedure and for being unwarranted on the merits. The Texas Supreme Court denied the state appellants' petition for writ of error, and this Court denied their subsequent petition for certiorari. *Humble Exploration Company, Inc. v. Browning,* 690 S.W.2d 321 (Tex. App. 1985, writ ref'd n.r.e.). *cert. denied,* 106 S.Ct. 1376, *rhg. denied,* 106 S.Ct. 1807 (1985).

any relief in the state court suit by the bankruptcy court's prior order;

2. a declaratory judgment that the state court judgment was void for lack of due process;
3. a permanent injunction against the defendants from:
   a. taking any further action in the state court case;
   b. pursuing any receivership or injunctive relief;
   c. attempting to enforce or collect on the state court judgment; and
   d. interfering in any way with the plaintiffs' operation of Humble or attempting to manage the assets or interests of any of the plaintiffs in this suit;
4. compensatory and punitive damages for violating or conspiring to violate 42 U.S.C. § 1983 in excess of $200 Million;
5. divestment of any interest of the Brownings or any other defendant in Humble, Holloway or Sterling; and
6. a prohibition against any of the defendants from prosecuting any claims against the plaintiffs or engaging in the same type of businesses in which Holloway, Humble, and Sterling either are or were engaged. (See Appendix B-3 to B-6).

Holloway and the other plaintiffs alleged that the Browning Interests and their attorneys had conspired with the state district judge, Judge Walker, and others to steal Humble, Sterling and other assets by seizing the state court[14] suit

[14]This is not the first time that Holloway has alleged that judges who rule adversely to him were corrupt. In an unsuccessful effort to obtain Texas Supreme Court review of *Atchley v. The Superior Oil Co.*, 482 S.W.2d 883 (Tex. Civ. App. 1982), Holloway, as an attorney, filed a motion for rehearing suggesting that the seven members of the Texas Supreme Court who had denied review were corrupted. The Texas Supreme Court struck the motion for rehearing. Holloway, still acting as an attorney, then filed a federal court lawsuit against the seven sitting

from another state trial court and conducting a sham trial. After several years of discovery and other pretrial

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members of the Texas Supreme Court and the state trial judge for a declaratory judgment that the state court and Texas Supreme Court rulings and judgment were void, alleging various irregularities and improprieties by the judges in the course of the state litigation depriving his client of his constitutional right to due process and equal protection. *Atchley v. Greenhill,* 373 F.Supp. 512 (S.D. Tex. 1974). The district court dismissed the suit, holding in part:

> Defendant justices and judge are charged with personal improprieties in the discharge of their duties as state officials. The concept of minimal federal interference with state government dictates that this matter be dealt with by state procedures. The prospect of federal court reviewing state court proceedings for judicial bias or interest is an effrontery to the concept of federalism. 373 F.Supp. at 515.

The Fifth Circuit affirmed, citing *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923). *Atchley v. Greenhill,* 517 F.2d 692 (5th Cir.), *rhg. denied,* 521 F.2d 814 (5th Cir. 1975), *cert. denied,* 424 U.S. 915 (1976).

In *Browning v. Holloway,* the state court action under attack in this suit, Holloway testified that he had filed the bankruptcy proceedings because the state district judge in whose court the suit was originally filed, Judge Hugh Snodgrass, was crooked. Subsequently, in the direct appeal in the state appellate courts, Holloway argued to the Texas Supreme Court that the judgment of the intermediate appellate court was premised "... on palpably false notions of law, a conscious ignorance of federal court-state court relationships and constitutional law, and a willful misreading of the record." Petitioners' Motion for Rehearing of their Application for Writ of Error, at 7, *Humble Exploration Company v. Browning,* No. C-4129, Texas Supreme Court.

Similarly, Holloway implied improprieties by other judges in his subsequent collateral Lee County cases. Following the Texas Supreme Court's granting a conditional mandamus against Judge Placke, Judge Placke informed the parties that in the future the case would be heard by a fellow judge, Judge Towslee. Subsequently, Judge Towslee dismissed the collateral attack as outside the Lee County courts. In the subsequent appeal, as both appellant and the attorney for all the appellants, Holloway states in the brief of appellants that following the Supreme Court's mandamus ruling, "... Judge Towslee, who apparently assumed control of the case from Judge Placke, either on his own initiative or at the suggestion of the Defendants, then dismissed it for want of jurisdiction." Brief of Appellants, at 5, *Jaehne v. Starnes,* No. 14,693, Texas Court of Appeals at Austin. Holloway's description of Judge Towslee is similar to his allegations that Judge Walker seized control of the original state court lawsuit in order to rule against him.

procedures,[15] the district court granted defendant Ayres' Motion for Summary Judgment with respect to the plaintiffs' procedural due process claim but held that the plaintiffs stated claims of substantive due process which would not be dismissed. (Pet. App. at A-39).

Two weeks later, the district court granted summary judgment for the Browning Interests with respect to the federal claims holding that "Plaintiffs have not, after years of discovery, produced sufficient evidence of a conspiratorial agreement or conduct by the Browning Interests." (Appendix C-3).

The following month, in response to Ayres' motion to reconsider, the district court agreed that the plaintiffs' claims dealt with procedural due process controlled by *Parratt v. Taylor,* 451 U.S. 527 (1981) and *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194 (1984). The court then granted Ayres' motion to reconsider and all the defendants' motions for summary judgment, thereby dismissing the plaintiffs' 42 U.S.C. § 1983 claims with prejudice. (Pet. App. at A-23).

Holloway and the trustee appealed.[16] The Fifth Circuit affirmed the summary judgment granted by the district court, holding that under the *Parratt* and *Hudson* decisions,

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[15]The district court denied the motions to dismiss filed by the various defendants. Judge Walker took an interlocutory appeal. The Fifth Circuit reversed Judge Sanders' denial in part, holding that Judge Walker was entitled to absolute judicial immunity from the plaintiffs' damage claim. This Court denied certiorari. *Holloway v. Walker,* 765 F.2d 517 (5th Cir.), *cert. denied,* 106 S.Ct. 605 (1985). That was the appeal of the motion to dismiss that Petitioner repeatedly and erroneously suggests is this current appeal.

[16]Holloway also purported to appeal on behalf of Humble and Sterling. Prior to the notice of appeal, however, all of the outstanding stock in these two companies had been turned over to the Brownings pursuant to orders of the United States district court in the turnover suit. The new management of the companies did not authorize the appeal, and upon their motion, the Fifth Circuit dismissed the appeal as to Humble and Sterling. *Holloway v. Walker,* No. 85-1289 (5th Cir., Aug. 12, 1985) (order dismissing appeal of Humble and Sterling).

the conduct between Judge Walker and the other defendants alleged to amount to a conspiracy to deny Holloway a fair trial was subject to review in the Texas appellate courts and therefore was not a denial of due process by the state prohibited by the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

Holloway asks this Court to grant certiorari to discuss the scope of the *Parratt* and *Hudson* decisions. He contends that the *Parratt-Hudson* rule is a very narrow exception inapplicable to his case and that the Fifth Circuit's application of the rule conflicts with both the broad application this Court has given to 1983 cases and the narrower interpretations of *Parratt* and *Hudson* by other circuits. The Browning Interests disagree with Holloway's assertion that the Fifth Circuit's application of the *Parratt-Hudson* rule conflicts with this Court's teachings. The holdings of the other circuits may be distinguished from the Fifth Circuit's holding in this case, and, in any event, the Fifth Circuit correctly applied the *Parratt-Hudson* rule, while some other circuits may have attempted to avoid the rule.

Certiorari is not appropriate in this case because there is another basis for denying relief to plaintiffs without even addressing the *Parratt-Hudson* rule. Holloway seeks in this suit an unauthorized review of state court proceedings in lower federal courts. Although this issue was before it in this appeal, the Fifth Circuit chose to address the application of the *Parratt-Hudson* rule. However, the Fifth Circuit concurrently addressed this issue in Holloway's habeas corpus proceeding, where he argued that the Fifth Circuit should grant him relief from a contempt order in the turnover suit because the state court judgment enforced by the district court was constitutionally invalid. (See footnote 11, *supra*).

The Fifth Circuit denied the writ of habeas corpus, holding in part, "The inferior courts of the United States lack jurisdiction to test Petitioner's claim that the challenged state court judgments are constitutionally invalid." (Appendix A-2).

I. THE LOWER FEDERAL COURTS HAVE NO JURISDICTION TO REVIEW THE PROCEEDINGS IN *BROWNING V. HOLLOWAY.*

Holloway asks the lower federal courts in this suit to review the state court proceedings, seeking declaratory and injunctive relief that the state court judgment is void because the state trial judge allegedly conspired with the opposing parties and others to deny him a fair trial, in violation of the Due Process Clause of the Fourteenth Amendment. Such claims do not, however, authorize the lower federal courts to review the state court proceedings because those courts have no power to review individual decisions in state court cases. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476 (1983); *Atlantic Coastline R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 286, 296 (1970); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923).

As this Court stated in *Rooker,* 263 U.S. at 415-416:

> If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. . . . Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. . . . To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

Holloway's plea for monetary relief in the nature of compensatory and punitive damages directly calls upon the federal courts to review the state court proceedings. He claims the basis for those damages to be in the deprivation of his property by the denial of due process and the denial of a right to fair trial, which he purports to support by testimony of alleged *ex parte* meetings between the trial court judge and attorneys for other parties, combined with attacks on the correctness of the rulings and other decisions made by Judge Walker in the conduct of the state court proceedings. Such reviews of state court proceedings in the lower federal courts is likewise impermissible.

In *Feldman,* this Court rejected similar reasoning, which had been originally adopted by the Fifth Circuit in *Dasher v. Supreme Court of Texas,* 658 F.2d 1045 (5th Cir. 1981), seeking to justify a lower federal court review of a state admission decision, in the following language, 460 U.S. at 482 n.16:

> If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision. This the district court may not do.

These decisions delineating the role of the lower federal courts control this case. This case, therefore, is not an appropriate vehicle for further explanation of the *Parratt-Hudson* rule.

II. THE FIFTH CIRCUIT'S DECISION SUPPORTS THE RIGHT TO A FAIR TRIAL IN ACCORD WITH THIS COURT'S PRECEDENTS.

Petitioner argues that the Fifth Circuit has trivialized the right to a fair trial and that its holding cannot be reconciled

with this Court's holding in *Aetna Life Ins. Co. v. Lavoie,* 106 S.Ct. 1580 (1986) and its prior precedents, *Ward v. Village of Monroeville,* 409 U.S. 57 (1972); *In re Murchison,* 349 U.S. 133 (1955); *Tumey v. Ohio,* 273 U.S. 510 (1927). Petitioner completely misconstrues the holding and import of the Fifth Circuit's opinion. In no sense does the Fifth Circuit retreat or undermine the proposition that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. at 136. The Fifth Circuit focuses on how the state achieves this policy rather than on the abstract policy itself.

The Fifth Circuit correctly notes that a state may have statutes, policies, or standard procedures which could establish an institutional bias against a party. Indeed, *Ward, Murchison,* and *Tumey* all involved situations of institutional bias. Petitioner's claims, however, do not fall within this category. Instead, his claim is that the state trial judge was bribed by representatives of the opposing parties to deny him a fair trial. There is no allegation by Petitioner that such alleged activity is authorized or condoned by Texas statute, policy or procedures. Under these circumstances, the Fifth Circuit notes that ". . .no judicial system offers any guarantee, other than the postdeprivation right of appeal, that an individual judge will not act arbitrarily or corruptly." *Holloway v. Walker,* 784 F.2d at 1292.

In addition, Texas authorizes pretrial recusal proceedings entitling a party challenging a judge to a hearing before another judge as to the challenged judge's disqualification. Tex. R. Civ. P. 18a. (Appendix D-1). Holloway, in fact, made such a challenge against Judge Walker, alleging that he was biased, that he had improper connections with the opposing parties because he had been represented about a decade earlier in a few civil rights suits by one attorney for

the Browning Interests and the attorney for the state court receiver, and that he conducted numerous *ex parte* meetings resulting in rulings denying Holloway his due process rights. These allegations were heard by Judge Morris Rolston, a visiting retired judge, who found against Holloway on the merits of all these contentions. This Court has recognized that such recusal hearings are appropriate for allegations that a judge is biased in a specific case. *See, Ward v. Village of Monroeville,* 409 U.S. at 61.

Texas permits a denial of recusal to be reviewed on appeal. Tex. R. Civ. P. 18a. If the denial of recusal is found to be erroneous, the complaining party will, at a minimum, be entitled to a new trial before a different judge. This Court followed the same procedure in *Aetna Life Ins. Co. v. Lavoie,* where on direct appeal it reversed and remanded the case for further proceedings without the participation of the disqualified justice. This same procedure was also followed in *Ward, Murchison* and *Tumey.* In each of those cases, this Court granted certiorari in a direct review of the state court proceedings.

In Holloway's direct appeal of the state court judgment, he filed multiple points of error, contending that it was error for Judge Walker to sit on the case.[17] Holloway's appeal was, however, determined adversely to him; the Texas court of appeals dismissed his appeal for abusing the Texas judicial process. *Humble Exploration Company v. Browning,* 677 S.W.2d 111, en banc opinion on motion to reinstate, 690

[17]Petitioner's points of error 20 through 24 all contended that the failure to recuse Judge Walker was reversible error. E.g., point of error number 24 stated, "The failure by the trial court to grant the motion to recuse operated to deprive appellants of procedural due process, as guaranteed by the Constitutions of the State of Texas and of the United States." These points of error were among 211 points raised by Petitioner in his three-volume Brief of Appellants, consisting of over 500 pages.

S.W.2d 321 (Tex. Civ. App. — Dallas 1985, writ ref'd n.r.e.). The effect of a dismissal of appeal is to affirm the judgment below without according to the appealing parties a hearing on the merits of their appeal. *International Ass'n of Machinists v. Federated Ass'n of Accessory Workers,* 130 S.W.2d 282, 283 (Tex. 1939). This result is comparable to a dismissal with prejudice by a federal district court under Fed. R. Civ. P. 37 or 41(b) as a sanction for improper conduct by a party. *See, National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639 (1976).

Holloway then applied for certiorari from this Court in a direct review of the state court judgment. *Humble Exploration, Inc. v. Jane H. Browning,* No. 85-1182. The first question presented to this Court was as follows:

> Were Petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the federal Constitution denied when a Texas Court of Appeals dismissed their pending appeal from a judgment rendered against them in the Court of first instance by a biased and corrupted judge following an unfair trial, on the ground that Petitioners forfeited their appeal by unsuccessfully collaterall_ ttacking the validity of that judgment when Respondents sued to enforce it in federal court?[18]

[18]In that petition for certiorari, Holloway specifically argued that he had been denied a fair trial by a corrupted judge in the following language:

> In this case, the trial in the court of first instance was not only unfair, but a complete sham. In effect, there was a judgment rendered against Petitioners depriving them of their property without a hearing, for a hearing before a biased and corrupted judge amounts to no hearing at all. [citations omitted]. Judge Walker's relationship with Respondents and his overwhelming prejudice against Petitioners was demonstrated repeatedly throughout the trial. Moreover, after the trial, the federal District Court for the Northern District of Texas ruled in Petitioners' § 1983 action against Judge Walker, Respondents and others, that Petitioners had produced competent summary judgment evidence that Judge Walker and one of the Respondents' counsel were engaged in a conspiracy against Petitioners to rig the outcome of the trial.

This Court has correctly and finally denied that petition for certiorari, *Humble Exploration Company v. Browning,* 106 S.Ct. 1376 (1986) and denied their motion for rehearing. 106 S.Ct. 1807 (1986).

The essence of the Fifth Circuit's holding in this case is that whatever relief a party may be entitled to based on allegations of bias and corruption on the part of a trial judge must be resolved in a direct review of the trial within the appropriate judicial system and not brought as a collateral attack of state judicial proceedings in the federal judicial system.

III. THE FIFTH CIRCUIT CORRECTLY FOLLOWED *PARRATT* AND *HUDSON.*

Petitioner claims that the Fifth Circuit's application of the *Parratt-Hudson* rule ignores a century-old precedent holding that abusive state power may violate the Fourteenth Amendment, even where the state provides adequate procedures for review and redress, citing *Ex parte Virginia,* 100 U.S. 339, 347 (1880), and *Home Telephone & Telegraph Co. v. Los Angeles,* 227 U.S. 278 (1913). The gist of Petitioner's argument seems to be that because the state acts through individuals, his right to due process, therefore, was purportedly violated by Judge Walker's "conduct of a trail, his entry of an award of damages, his imposition of receiverships and constructive trust and his rendering of a judgment N.O.V.

Petition for Writ of Certiorari at 12-13, *Humble Exploration Company v. Browning,* 106 S.Ct. 1376 (1986). He concluded that petition with the following (*Id.* at 23-24):

> Here the application of this new rule of forfeiture to Petitioners is particularly reprehensible since their property was taken from them by a corrupted judge in gross violation of their federal constitutional right to a fair trial before an impartial judge in the first instance — "the right that stands guardian over all other rights." *Dennis v. United States,* 339 U.S. 162, 173 (1950) (Jackson, J., concurring).

— in short, through his exercise in this case of the judicial authority with which the State of Texas clothed him." (Petition at 14-15).

The essence of Petitioner's argument is merely a variation of the inmate's argument in *Hudson*. Palmer complained that Hudson intentionally destroyed certain of his personal property during a shakedown search of his cell. Hudson's alleged deprivation of Palmer's property rights was an abuse of his authority to conduct shakedown searches in the prison. Petitioner's argument in this case is merely a derivation of Palmer's argument that Hudson himself could have provided predeprivation process and that his failure to do so was a denial of due process. This Court rejected Palmer's argument. Holloway claims that the process provided by Judge Walker before the deprivation by the entry of judgment was not adequate in arguing that *Hudson* does not apply. Under Petitioner's analysis, Palmer would have stated a due process violation if he claimed that Hudson had conducted a sham summary proceeding before intentionally destroying Palmer's property. This analysis does not comport with this Court's statement in rejecting Palmer's argument, 104 S.Ct. at 3204:

> Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the *State* is in a position to provide for predeprivation process. (emphasis supplied).

Petitioner also claims that this Court precluded the application of the *Parratt-Hudson* rule to suits claiming that state judges conspired with other persons to deny a fair trial in the state courts when it found in *Dennis v. Sparks*, 449 U.S. 24 (1980), affirming *Sparks v. Duval Ranch Co.*, 604 F.2d 976 (5th Cir. 1979) that private parties who corruptly

conspired with a state judge were acting under color of state law because this Court purportedly:

> . . .took it for granted that they could accordingly be sued under § 1983 for violating due process, notwithstanding the availability of state appellate relief from the corrupt trial court decree (Petition at 9).

Petitioner thus argues, in essence, that a holding that certain actions are "under color of state law" for § 1983 purposes also determines whether there is a Fourteenth Amendment due process violation. The fallacy in this argument is demonstrated by this Court's own posit of the question in *Hudson,* 104 S.Ct. at 3202:

> The question presented for our review in Palmer's cross-petition is whether our decision in *Parratt v. Taylor* should extend, as the Court of Appeals held, to intentional deprivations of property *by state employees acting under color of state law.* (emphasis added).

Neither *Ex parte Virginia* nor *Home Telephone & Telegraph Co. v. Los Angeles* is even relevant to these proceedings. *Ex parte Virginia* was a habeas corpus case before the United States Supreme Court filed by a Virginia county court judge who was indicted in a lower federal court for illegally excluding black citizens from the grand and petit jury list in violation of a federal criminal statute prohibiting racial disqualification from a grand or petit jury. The central issue of the case was whether the federal criminal statute was constitutional. The Court held that Congress' passage of the statute was within its constitutional powers to enforce by appropriate legislation the Thirteenth and Fourteenth Amendments of the Constitution, which were specifically intended to raise the Negro race from the condition of inferiority and servitude in which they had previously been held. The Court held that the Congress could

constitutionally prohibit persons, no matter what their position with a state government might be, from continuing to discriminate on the basis of race in conflict with the equal protection provisions of the Fourteenth Amendment. Nothing in either *Hudson v. Palmer* or the Fifth Circuit's opinion conflicts in any way with the holding in *Ex parte Virginia.*

Home Telephone & Telegraph Co. v. Los Angeles is similarly inapposite. That case dealt with the City of Los Angeles' efforts to fix telephone rates allegedly so unreasonably low that their enforcement worked as a confiscation of the corporation's property. The issue involved in that case was whether the telephone rates had to first be found to comply with the state constitution, which had a similar prohibition against the deprivation of life, liberty or property without due process of law, before they could be challenged as a deprivation of property without due process. This Court held that an unreasonably low rate ordinance could be prohibited by the Fourteenth Amendment without regard to whether or not it was prohibited by the state constitution.

There is no conflict between that holding and the Fifth Circuit's opinion in this case. In fact, *Home Telephone & Telegraph Co.* should be read in light of the Court's decision of last year in *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 105 S.Ct. 3108 (1985). That case was a 1983 suit charging that the application of local zoning laws and regulations amounted to a confiscatory taking of the plaintiff's property in violation of the just compensation clause of the Fifth Amendment as applicable to the states through the Fourteenth Amendment. This Court held that the taking claim was not ripe because the plaintiff had not sought compensation through the state's compensation procedures. The Court specifically analogized its decision to *Parratt* and *Hudson,* stating, 105 S.Ct. at 3121:

> Thus, the State's action is not "complete" in the sense of causing a constitutional injury "unless and until the State fails to provide an adequate postdeprivation remedy for the property loss." *Hudson v. Palmer*, ____ U.S. ____, ____, n. 12, 104 S.Ct. 3194, 3203, n. 19, 82 L.Ed.2d 393 (1984).

IV. ANY ASSUMED DIFFERENCES BETWEEN THE FIFTH CIRCUIT'S OPINION AND THE OPINIONS OF TWO OTHER CIRCUITS DO NOT WARRANT CERTIORARI IN THIS CASE.

In affirming this case, the Fifth Circuit did reject unduly restrictive interpretations of *Parratt* and *Hudson* applied by the Second Circuit in *Patterson v. Coughlin*, 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 879 (1986), and the Ninth Circuit in *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985). While these opinions may demonstrate a difference in interpretation of *Parratt* and *Hudson* among these circuits on certain matters, this suit is not the appropriate case to address such differences because *Feldman* and its predecessors make the dispute academic. As this Court states in *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959):

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly.

In addition, the Fifth Circuit has followed not only the letter but also the spirit of *Parratt* and *Hudson* in its opinions in this case, while the Ninth Circuit and the Second Circuit are apparently attempting to minimize the

application of *Parratt* and *Hudson*. In *Bretz v. Kelman*, the Ninth Circuit held that *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), rather than *Parratt*, applied to an allegation in a § 1983 suit that police, prosecutors and personal enemies of the plaintiff conspired to falsely accuse and prosecute him for burglary. In that case, the plaintiff was not attacking the state trial proceeding itself, in which he was *acquitted* for lack of credible evidence. 773 F.2d at 1027. In the view of the Ninth Circuit, *Parratt* did not apply because the keystone to the *Parratt* line of cases was that the alleged conduct was random and unauthorized. The Ninth Circuit noted that a conspiracy is not a random act "...even if it was accomplished without the endorsement of the state government apparatus." The Ninth Circuit concluded:

> As in *Logan*, Bretz is challenging the direct abuse of the state process itself. It is meaningless to speak of the state's ability to provide postdeprivation remedial process when the state process itself has been abused. Consequently, so as in *Logan*, the state cannot satisfy the due process clause here by providing Bretz with a postdeprivation remedy in state court in the form of a tort action for malicious prosecution. 773 at 1031.

The Fifth Circuit declined to follow this reasoning, correctly noting that the Ninth Circuit's interpretation of "random acts" is really simply another aspect of intentional versus unintentional acts treated by this Court in *Hudson*. The Sixth Circuit has also rejected the argument that "... alleged conspiratorial acts of public officials whose duty was to see that plaintiffs were not denied due process" are excluded from random and unauthorized acts of misconduct covered by *Parratt* and *Hudson*. *National Communication Systems, Inc. v. Michigan Public Service Commission*, 789 F.2d 370, 372 (6th Cir.), *cert. denied*, 55 U.S.L.W. 3208, 3235 (Oct. 6, 1986). Under the Ninth Circuit's interpretation,

if two prison officers intentionally destroyed Palmer's property, there would have been a violation of the Fourteenth Amendment whether or not the state provided adequate postdeprivation remedies. This interpretation simply misreads *Hudson*. *Hudson* turns not on the number of persons allegedly involved but on the state providing an adequate compensation mechanism for purported improper but unauthorized and random deprivations by individuals.

The Ninth Circuit's interpretation of *Logan* is also faulty. *Logan* was not a challenge of an abuse of the state process, but rather an attack on the state process itself. A this Court specifically pointed out in distinguishing *Parratt*, 455 U.S. at 436:

> Unlike the complainant in *Parratt*, Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.

The problem in *Logan* was not whether the Commission either negligently or intentionally failed to process a complainant's discrimination charge within a specific period of time, but rather that the institutional legal process of the state itself extinguished the claimant's rights if the Commission for any reason failed to act within a specified time.

Patterson v. Coughlin suffers a similar deficiency. In *Patterson v. Coughlin*, the Second Circuit held that the deprivation of the plaintiff's liberty was not a random and unauthorized event. Therefore, it held that *Parratt* did not apply because the state could provide a predeprivation hearing. In fact, the state provided a hearing but subsequently admitted that the hearing was constitutionally defective. The Second Circuit also held that the postdeprivation proceeding provided by the state was inadequate for the deprivation of liberty. This finding in *Patterson* that the

postjudgment remedy was inadequate distinguishes *Patterson* dramatically from this case. The Fifth Circuit did, however, reject some of the analysis in *Patterson* relied upon by Petitioner. The Fifth Circuit noted that this Court had expressly rejected a similar argument in *Hudson,* 104 S.Ct. at 3204:

> [Respondent] contends that, because an agent of the state who intends to deprive a person of his property "*can* provide predeprivation process, then as a matter of due process he must do so." . . . This argument reflects a fundamental misunderstanding of *Parratt.* There we held that postdeprivation procedures satisfy due process because the *State* cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the State is in a position to provide for predeprivation process.

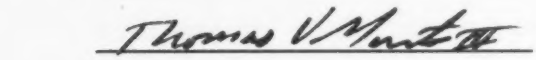
Moreover, subsequent to *Patterson,* the Second Circuit has recognized itself that under *Feldman* and *Rooker* the lower federal courts are not permitted to review state court proceedings. *Texaco, Inc. v. Pennzoil Co.,* 784 F.2d 1133, 1141-1143 (2d Cir. 1986).

Petitioner asks this Court not only to radically limit *Parratt* and *Hudson* to merely trivial losses but also to overrule or ignore its longstanding rule that lower federal courts have no jurisdiction to review state court proceedings.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 22d day of October, 1986, three copies of Brief in Opposition of the Browning Respondents were mailed, postage prepaid, to Mr. Laurence H. Tribe, attorney of record for Petitioner, 1525 Massachusetts Avenue, Cambridge, Massachusetts 02138, and to all counsel of record who appeared for the various Respondents at the court of appeals. I further certify that all parties required to be served have been served.

Thomas V. Murto III

THOMAS V. MURTO III

U.S. COURT OF APPEALS
FILED
MAR 19 1986
GILBERT F. GANUCHEAU
CLERK

In The

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 86-1164

IN RE:

PAT S. HOLLOWAY,

Petitioner

On Application for a Writ of Habeas Corpus

Before CLARK, Chief Judge, POLITZ, and WILLIAMS, Circuit Judges.

BY THE COURT:

Pat S. Holloway petitions this Court to issue a writ of *habeas corpus cum causa ad subjiciendum.* The bases of the petition are threefold: (1) the order of the district court adjudging him to be in civil contempt and fixing the conditions for purging that contempt constitutes a restraint of liberty, (2) this and the underlying turnover enforcement order the district court found to be contempted are not appealable, and (3) the state court judgments enforced by the underlying order are constitutionally invalid.

The order of civil contempt is not a restraint of liberty unless petitioner voluntarily chooses to make it so by continuing to defy the lawful orders of the district court. The entire sequence of turnover orders and enforcement orders issued in aid thereof are injunctive in nature and therefore were appealable. The inferior courts of the United States lack jurisdiction to test petitioner's claim that the challenged state court judgments are constitutionally invalid.

The petition is

DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

PAT S. HOLLOWAY, Individually, HUMBLE EXPLORATION COMPANY, INC., AND STERLING PIPELINE COMPANY, and DON NAVARRO, Trustee of the Estates of HUMBLE EXPLORATION COMPANY, INC. and PAT S. HOLLOWAY,

Plaintiffs,

VS.

JUDGE DEE BROWN WALKER, JUDGE OF THE 162ND JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS, G. H. KELSOE, JR., R. JACK AYRES, JR., Individually, and as a Professional Corporation, JOHN WRIGHT, WHITLEY R. SESSIONS, J. R. HURT, JANE H. BROWNING, Individually as Co-Independent Executrix & as Co-Trustee, of the ESTATE OF WILLIAM W. BROWNING JR., Deceased, MICHAEL G. STARNES, Individually as Co-Independent Executor of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee for Kathryn Louise Browning Cook, Averille Adams Browning, William Webb Browning III, Winifred Fallon Browning, and Robert Holland Browning; CATHERINE AGNES LAND STARNES, Individually; KATHRYN LOUISE BROWNING COOK, Individually, AVERILLE ADAMS BROWNING, Individually, WILLIAM WEBB BROWNING III, ROBERT HOLLAND BROWNING, Individually, and WINIFRED FALLON BROWNING, Individually, and FAIRWAY LAND COMPANY, FAYETTE OIL COMPANY, AMCAP PETROLEUM ASSOCIATES-1977, AMCAP PETROLEUM ASSOCIATES-1977B, AMERICAN HAWK OIL COMPANY, AMERICAN FALCON OIL COMPANY, AMERICAN EAGLE OIL COMPANY, AMERICAN HERON OIL COMPANY, AMERICAN WREN OIL COMPANY, AMERICAN RAVEN OIL COMPANY, HARPER OIL COMPANY and JEFFREY WEISS and DONALD GINSBERG, Individually, and as General Partners of AMERICAN PETROLEUM PARTNERS,

Defendants.

NO. CA-3-82-1846-H

PLAINTIFFS' FIRST AMENDED COMPLAINT AND APPLICATION FOR DECLARATORY AND INJUNCTIVE RELIEF

PAT S. HOLLOWAY, Individually ("HOLLOWAY"), HUMBLE EXPLORATION COMPANY, INC. ("HUMBLE"), STERLING PIPELINE COMPANY ("STERLING"), AND DON NAVARRO, Trustee of the Estates of Humble Exploration Company, Inc. and PAT S. HOLLOWAY ("NAVARRO"), Plaintiffs herein, file this their First Amended Complaint and Application for Injunctive and Declaratory Relief, complaining of JUDGE DEE BROWN WALKER, individually and in his official capacity as JUDGE OF THE 162ND JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS, G. H. KELSOE, JR., R. JACK AYRES, JR., Individually, and as a professional corporation, JOHN WRIGHT, WHITLEY R. SESSIONS, J. R. HURT, JANE H. BROWNING, Individually and as Co-Independent Executrix and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, MICHAEL G. STARNES, Individually and as Co-Independent Executor of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee for Kathryn Louise Browning Cook, Averille Adams Browning, William Webb Browning III, Winifred Fallon Browning, and Robert Holland Browning; CATHERINE AGNES LAND STARNES, Individually, AVERILLE ADAMS BROWNING, Individually, WILLIAM WEBB BROWNING III, Individually, and ROBERT HOLLAND BROWNING, Individually, ("THE BROWNINGS"); FAIRWAY LAND COMPANY, FAYETTE OIL COMPANY, AMCAP PETROLEUM ASSOCIATES — 1977, AMCAP PETROLEUM ASSOCIATES — 1979B, AMERICAN HAWK OIL COMPANY, AMERICAN FALCON OIL COMPANY, AMERICAN EAGLE OIL COMPANY, AMERICAN HERON OIL COMPANY, AMERICAN WREN OIL COMPANY, AMERICAN RAVEN OIL COMPANY, HARPER OIL COMPANY, JEFFREY WEISS and DONALD GINSBERG, Individually and as General Partners of AMERICAN PETROLEUM PARTNERS, (hereinafter the "APP Entities"), and ALLIED

FIDELITY INSURANCE COMPANY ("ALLIED"), Defendants herein, and for their complaint would show the Court:

* * *

197. WHEREFORE, Plaintiffs respectfully pray this Court advance this case on the docket, order a speedy hearing at the earliest practicable date, and upon such hearing enter a permanent injunction enjoining each and every Defendant or any of their agents, employees, attorneys, or persons participating with them from:

1. Taking any further action in the 162nd Judicial District Court of Dallas County, Texas, in Cause No. 82-5742-I, *Fairway Land Company, et al v. Humble Exploration Company, Inc.*, and from acting in any way in any type of legal proceeding involving in any way Humble, Sterling, Pat S. Holloway, his present or former wife, or any present or former officer, employee, or agent of Plaintiffs or any person or entity related to any of the foregoing;

2. Maintaining or pursuing, in any court, any receivership and/or injunctive proceeding and/or relief against any of the named Plaintiffs herein, their agents, servants, employees, attorneys, or persons in participation with them;

3. Attempting to collect or enforce in any way any order or judgment heretofore or hereafter made or entered by Defendant Judge Walker; and

4. Taking any further action in an attempt to interfere in any way with the lawful owner's operation at the business of Humble or from any attempt to manage the assets and/or interests of any of said Plaintiffs herein.

198. Plaintiffs further pray that the Court order any further equitable and injunctive relief as it deems appropriate and necessary to correct the conditions complained of herein.

200. Plaintiffs further pray that this Court grant them their costs of court, reasonable attorney's fees, and such

other additional or alternative relief as may appear to the Court to be equitable, reasonable and just.

PRAYER

WHEREFORE, Plaintiffs pray for a judgment:

1. Declaring that the Stipulation and Agreement which became part of the Bankruptcy Court's judgment rendered by the United States Bankruptcy Court on the docket of said Court establishes a complete and conclusive bar against any relief asserted by the Defendants Browning based in any way on any proceeding occuring by Cause Nos. 82-5742-I or 79-9623-L;

2. Declaring that the final judgment entered by Defendant Judge Walker on August 26, 1982, and all other orders or judgments heretofore or hereafter entered by Defendant Judge Walker in Cause No. 82-5742-I or 79-9623-L are void and of no force or effect for lack of due process;

3. That a permanent injunction be issued ordering the named Defendants, their agents, servants, employees, attorneys and all persons in active concert and participation with them from taking any further action against the named Plaintiffs;

4. That Plaintiffs recover actual damages from Defendants jointly and severally, for Defendants' violation of 42 U.S.C. § 1983, which sum is alleged to be in excess of Fifty Million Dollars ($50,000,000);

5. That Plaintiffs recover actual damages from Defendants for Defendants' conspiracy to violate 42 U.S.C. § 1983 (Count Two) which sum is alleged to be in excess of Fifty Million Dollars ($50,000,000);

6. That Plaintiffs recover as punitive damages from Defendants jointly and severally for their malicious intent to violate 42 U.S.C. § 1983, an amount of at least One Hundred Million Dollars ($100,000,000),

and that Plaintiff Holloway individually recover against Defendants for the mental anguish and suffering caused by Defendants' violation of his civil rights without due process of law in violation of 42 U.S.C. § 1983 in an amount yet to be determined by Plaintiff Holloway;

7. That Defendants be divested of any interest, direct or indirect, in Humble, Holloway or Sterling, and that an order be entered restricting Defendants from prosecuting any claims against any of the Plaintiffs which arose prior to the institution of this action and prohibiting any of the Defendants from engaging in the same type of endeavors as Humble, Holloway, or Sterling is presently engaged in or in which any of them has in the past been engaged;

8. Requiring Defendants jointly and severally to account to Plaintiffs for all moneys received, expended, disbursed, and retained by Defendants from the Plaintiffs;

9. That upon said accounting Plaintiffs have judgment against Defendants, jointly and severally for the amount found due;

10. That Plaintiffs be awarded a judgment against Defendant Wright for his grossly negligent and incompetent mishandling of Humble and Holloway property, assets, and business operations while he was a receiver over the Plaintiffs. The amount of actual and punitive damages has yet to be determined, but Plaintiffs represent that the amount is well in excess of jurisdictional limits of this court;

11. That Plaintiffs recover all damages to which they are justly entitled, which sum is alleged to be in excess of the minimal jurisdictional requirements of this Court;

13. Awarding Plaintiffs their costs of suit and attorney's fees pursuant to 42 U.S.C. § 1988;

14. For the maximum amount of pre- and post-judgment interest on all damages as permitted by law; and

15. Granting Plaintiffs such other and further relief to which Plaintiffs may be justly entitled either at law or equity.

Respectfully Submitted

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U.S. District Court
Northern District Of Texas
FILED
MAR 28 1985
Nancy Hall Doherty, Clerk
By DW
Deputy

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

PAT S. HOLLOWAY, et al.

Plaintiffs

v.

JUDGE DEE BROWN WALKER, et al.

Defendants

Civil Action No. 3-82-1846-H

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendants The Browning Interests'[1] Motion for Summary Judgment and Motion to Dismiss, filed January 29, 1985; Plaintiffs' Response, filed February 21, 1985; and Defendants' Rejoinder, filed March 13, 1985.

Defendants have adopted the Motion for Summary Judgment of Defendant R. Jack Ayres, Jr. Rather than reproduce here the lengthy ruling on that Motion, the Court hereby incorporates the Memorandum Opinion and Order, filed March 11, 1985. The Court granted the Motion with

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[1]Jane H. Browning, Michael G. Starnes, Catherine Agnes Land Starnes, Katherine Browning Cook, Averille Browning Dawson, William Browning III, Winifred Fallon Browning, and Robert Browning.

respect to Plaintiffs' procedural due process claims, and denied it in all other respects.

Defendants here argue that there is no summary judgment evidence linking them with the alleged conspiracy to deprive Plaintiffs of their constitutional right to a fair trial. They argue that they cannot be held vicariously liable for any actions of their attorneys, Defendants Kelsoe and Ayres.

Michael Starnes and Jane Browning have provided affidavits stating that they "handled all of the direction and guidance to the attorneys in [the state cases]." They avow that they had no *ex parte* contacts or communications with Judge Walker[2], and never "authorized either of our attorneys or any other party to make any improper effort to obtain Judge Walker to rule in any manner in our behalf in either the *Browning v. Holloway* case or the *Fairway Land* case". Further, they state that they "have not participated in nor have I or anyone else representing the Browning Interests authorized our attorneys or anyone to manipulate the docket, conspire with others or in any other manner attempt to improperly affect the result of either the *Browning v. Holloway* case or the *Fairway Land* case.

Plaintiffs have produced no evidence rebutting this denial. They have cited no acts allegedly committed in furtherance of the conspiracy by the Brownings. Although there certainly is a line of authority for supervisory liability under § 1983, there is no fact issue as to any improprieties in control or direction of the attorneys, *see Rizzo v. Goode,* 423 U.S. 362 (1976), personal participation, affirmative promotion of a policy which sanctions the type of action which caused the violation, *see Duchesne v. Sugerman,* 566 F.2d 817, 830-31

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[2]Plaintiffs have presented evidence pertaining to alleged ex parte meetings involving Starnes on May 14, 1982, and Jane Browning on August 31, 1982. The May meeting, prior to the filing of the lawsuits, was in no sense improper, *see* Gillette, Weiss, Musselwhite and Ayres affidavits, filed with Defendant APP Entities' Motion, and is not relevant to the civil rights claim as defined by this court. Jane Browning was not present at the August meeting. Nye Affidavit.

(2d. Cir. 1977), or violation of an explicit duty to supervise. *See Howard v. Fortenberry,* 723 F.2d 1206 (5th Cir. 1984).

Although the Court recognizes the importance in a civil rights conspiracy action to allow a plaintiff to prove all permissible inferences from actions shrouded in secrecy, *see Ferguson v. Omnimedia, Inc.,* 469 F.2d 194, 198 (1st Cir. 1972), Plaintiffs have not, after years of discovery, produced sufficient evidence of conspiratorial agreement or conduct by the Browning Interests.

Accordingly, Defendants' Motion for Summary Judgment should be, and hereby is, **GRANTED IN PART** with respect to the federal claims and **RESERVED** with respect to the pendent state-law claims.

SO ORDERED.

DATED: March 28, 1985.

BAREFOOT SANDERS
BAREFOOT SANDERS
UNITED STATES DISTRICT JUDGE

TEXAS RULES OF CIVIL PROCEDURE

Rule 18a. Recusal or Disqualification of Trial Judge

(a) At least ten days before the date set for trial or other hearing in district court, any party may file with the clerk a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with a notice that movant expects the motion to be presented to the judge three days after the filing of such motion unless otherwise ordered by the judge. Any other party may file with the clerk an opposing or concurring statement at any time before the motion is heard.

(c) Prior to any further proceedings in the case, the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

(d) If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.

(e) If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing.

(f) If the motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case.

(g) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to Article 200a.

(Added by order of June 10, 1980, eff. Jan. 1, 1981.)

This is a new rule.

Supreme Court, U.S.
FILED
OCT 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-271 (A)

In The
Supreme Court of the United States
OCTOBER TERM, 1986

PAT S. HOLLOWAY,
Petitioner,
v.
JUDGE DEE BROWN WALKER, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS, Dee Brown Walker, Fairway Land Co., Fayette Oil Co., AMCAP Petroleum Associates-1977, AMCAP Petroleum Associates-1979B, American Hawk Oil Co., American Falcon Oil Co., American Eagle Oil Co., American Heron Oil Co., American Wren Oil Co., American Raven Oil Co., Harper Oil Co., Jeffrey Weiss, Donald Ginsberg, and American Petroleum Partners.

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Adoption of Briefs Filed on Behalf of Other Respondents

In the interest of brevity, and to avoid burdening the Court with multiplicitous briefing, the Respondents Dee Brown Walker, and Fairway Land Co., Fayette Oil Co., AMCAP Petroleum Associates-1977, AMCAP Petroleum Associates-1979B, American Hawk Oil Co., American Falcon Oil Co., American Eagle Oil Co., American Heron Oil Co., American Wren Oil Co., American Raven Oil Co., Harper Oil Co., Jeffrey Weiss, Donald Ginsberg, and American Petroleum Partners (the "APP Entities") hereby adopt as their own and incorporate by reference as if fully set forth herein the Briefs in Opposition to Petition for Certiorari filed in this cause on behalf of the Browning Interests, R. Jack Ayres, John Wright and G. H. Kelsoe.

Respondents Dee Brown Walker and the APP Entities pray that the Petition for Certiorari be denied.

Respectfully submitted,

By:_____

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of October, 1986, three copies of Brief in Opposition of the Respondents Dee Brown Walker and the APP Entitites were mailed, postage prepaid, to Mr. Laurence H. Tribe, Attorney of Record for Petitioner, 1525 Massachusetts Avenue, Cambridge, Massachusetts 02138, and to all counsel of record who appeared for the various Respondents at the court of appeals. I further certify that all parties required to be served have been served.

BRUCE W. CLAYCOMBE

Supreme Court, U.S.
FILED
NOV 5 1986
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CLERK

No. 86-271

In The

Supreme Court of the United States

OCTOBER TERM, 1986

PAT S. HOLLOWAY,

Petitioner,

v.

JUDGE DEE BROWN WALKER, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT KELSOE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November, 1986

STATEMENT OF QUESTIONS PRESENTED

1. Whether the loser in a state court trial may obtain a review of the state court judgment in a United States district court by bringing a suit under 42 U.S.C. § 1983 alleging deprivation of property without due process in the state court trial.

2. Whether the rule enunciated in the *Parratt v. Taylor* and *Hudson v. Palmer* decisions of the United States Supreme Court applies to an alleged deprivation of property without due process in a state court trial when the state provides an appellate review process to correct errors made by the trial judge.

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No. 86-271

In The

Supreme Court of the United States

OCTOBER TERM, 1986

PAT S. HOLLOWAY,

Petitioner,

v.

JUDGE DEE BROWN WALKER, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT KELSOE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Kelsoe respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Pat S. Holloway seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit's opinions are reported at 784 F.2d 1287, *rehearing denied*, 790 F.2d 1170 (5th Cir. 1986).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Constitution, Amendment XIV:

> No State shall . . . deprive any person of life, liberty, or property without due process of law . . .

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

JURISDICTION

Petitioner has applied for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit. There is no federal jurisdiction in this case because the federal district court had no subject matter jurisdiction to review a state court judgment.

STATEMENT OF THE CASE

This case was brought under 42 U.S.C. § 1983 and involves civil rights allegations that stem from two consolidated state court cases in which Petitioner Holloway was a Defendant. After losing in the original state court trial, Holloway pursued the full spectrum of state appellate remedies, appealing to the Texas Court of Appeals, where he lost, and then applying to the Texas Supreme Court for a Writ of Error, which was refused. He then applied to this Court for a Writ of Certiorari, which was also refused. *Humble Exploration Co. v. Browning*, 677 S.W.2d 111 (Tex. App. — Dallas

1984), *opinion on rehearing en banc*, 690 S.W.2d 321 (Tex. App. — Dallas 1985, writ ref'd n.r.e.), *cert. denied*, 106 S.Ct. 1376, (1986). In the present action, brought against the parties who were plaintiffs in the previous state court trial, their attorneys and other participants in that trial, Holloway attempted to collaterally attack the state court judgment via 42 U.S.C. § 1983.[1] Petitioner now seeks reversal of a summary judgment rendered against him by the federal district court and affirmed by the Fifth Circuit Court of Appeals.

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[1]This suit is only one of a number of collateral attacks Petitioner has made upon the single state judgment in both state and federal courts. He and other plaintiffs filed Cause No. 8066, styled *Jaehne, et al. v. Starnes, et al.*, on June 17, 1985, in the 21st Judicial District Court of Lee County, Texas. All Respondents in this case, except the APP Entities, are Defendants in that case, in which Holloway sought a declaratory judgment that the original state judgment rendered by the 162nd District Court of Dallas County, Texas, was "void," as well as other causes of action including trespass to try title, based on the proceedings and judgment in the prior state court action. Holloway as an attorney filed a second suit in Lee County on behalf of members of his family, alleging essentially the same claims, against certain of the Respondents here. After the state judge declared the original judgment void, the Texas Supreme Court conditionally granted an application for writ of mandamus requiring vacation of this order. *Browning v. Placke*, 698 S.W.2d 362 (Tex. 1985). The state court later dismissed the consolidated action for lack of jurisdiction. The case is currently on appeal to the Texas Court of Appeals in Austin, Texas, where Holloway continues to assert that the Dallas County judgment is void. Also, Holloway as an attorney for his daughter and royalty interest owners filed Cause No. CA3-84-0850-H, styled *Gregory, et al. v. Walker, et al.*, in the United States District Court for the Northern District of Texas, on May 25, 1984, against the Respondents in this case. The same conspiracy allegations that are contained in this suit were set forth in that case as a R.I.C.O. (18 U.S.C. § 1961) action. That case was dismissed on July 12, 1985. As for the federal courts, Holloway has sought a determination by the bankruptcy court in his individual bankruptcy case that the original state judgment was void, by reason of the same allegations made in this case, in the form of objections to the Browning Interests' claims for payment of their damages. He has also sought relief in original proceedings in the Fifth Circuit, including a habeas corpus action, alleging, among other claims, that he had diplomatic immunity from state court suit because he was an honorary Bolivian consul. The Fifth Circuit has rejected these claims. *Holloway v. Walker*, 800 F.2d 479 (5th Cir. 1986).

Respondent Kelsoe is in this case because he was an attorney for the winning side in the state court trial. By bringing this action, Petitioner seeks to steal victory from the jaws of defeat by claiming that that judgment should be set aside and declared "void and of no force and effect" because Petitioner was allegedly deprived of his property without due process because Respondents allegedly conspired against Holloway to "fix" the jury trial in violation of 42 U.S.C. § 1983. (Petitioner's Appendix, hereinafter Pet. App., at A-25.)

The first state court case, styled *Browning v. Holloway*, Cause No. 79-9623-I, was filed on September 11, 1979, by the Brownings, defendants and Respondents in the present case, who sought recovery from Holloway, Humble Exploration Co. and others for breach of fiduciary responsibility and fraud, asking damages and the imposition of a constructive trust on certain assets. This case was assigned to the 193rd Judicial District Court of Dallas County, Texas. After Holloway and Humble filed Chapter 11 voluntary bankruptcy petitions on November 19, 1979, they removed the state court case to the United States Bankruptcy Court, which remanded the case back to the state court on January 18, 1980. On May 26, 1982, a second state court case, styled *Fairway Land Company, et al., v. Humble Exploration Company, et al.*, No. 82-5742-I, was filed and randomly assigned to Judge Walker of the 162nd Judicial District Court of Dallas County, Texas. Plaintiffs in that case were a group of investors, including APP Entities (petroleum companies and partnerships that together are Respondents here) who sued because Humble had shut in a number of wells in which they had interests. This suit requested the appointment of a receiver. The Brownings were defendants in this suit, due to their claims against Holloway and Humble, but they were later realigned as plaintiffs.

The two actions were consolidated in the court of Judge Walker, who appointed a receiver. Holloway filed a Motion for Recusal against Judge Walker, in which he alleged bias and conflict of interest, as again alleged in this § 1983 action. Pursuant to Texas procedure, this motion was heard by another judge, who denied it after an extensive evidentiary hearing. The case was then tried to a jury before Judge Walker. The trial lasted more than six weeks and ended with findings by the jury adverse to Holloway.

On November 11, 1982, judgment was entered granting the Brownings $72 million damages from Holloway and imposing a constructive trust over all of the stock of Humble and Sterling Pipeline Company.

Holloway and the other state court defendants perfected an appeal from that judgment on November 24, 1982. No supersedeas bond to stay the enforcement of the state court judgment was filed. The trustee of the bankruptcy estate refused to turn over the property subject to the state court judgment, and the Brownings then brought a turnover suit to force the trustee to turn over the property. In their counterclaim, the trustee and Holloway contended that the state court judgment was void, claiming the state court had no jurisdiction due to violation of the bankruptcy court's remand order and the remand was not effective. The United States District Court held that the state court judgment was indeed void. *Browning v. Navarro*, 37 B.R. 201 (N.D. Tex. 1983).

At that time, Holloway's state court appeal of the original judgment was also proceeding. After the federal district court held that the state court judgment was void, the Texas Court of Appeals dismissed the appeal, reasoning essentially that Holloway had elected an inconsistent remedy in federal court. The court noted that the grounds of the federal

district court's opinion that the state court judgment was void — that the trial court had no jurisdiction because of the remand provisions — had not been presented to the trial judge, but was presented for the first time on appeal. It found that continuation of the state court appeal was "a two-fold hardship" because essentially the same judgment was being reviewed in both federal and state systems. *Humble Exploration Co. v. Browning,* 677 S.W.2d at 113.

Holloway's motion for rehearing of the dismissal of the appeal was denied on September 7, 1984. Then, on October 1, 1984, the Fifth Circuit reversed the federal court's decision, holding the state court judgment was not void because the remand order had been satisfied. *Browning v. Navarro,* 743 F.2d 1069 (5th Cir. 1984). On October 3, 1984, Holloway filed a motion in the state appellate court for relief from its order dismissing the appeal. The court first reinstated the appeal and then set aside the reinstatement for violation of the Texas procedural rules and for being unwarranted on the merits. The Texas Supreme Court denied the appellants' application for writ of error, and this Court denied their Petition for Writ of Certiorari.

In his state court appeal, Petitioner argued that the failure to recuse Judge Walker deprived him of procedural due process. The alleged violations of his due process rights due to bias, corruption and unfair trial were also asserted by Holloway in his Petition for Writ of Certiorari in this Court on the dismissal of his appeal from the judgment against him (Cause No. 85-1182).

The present 42 U.S.C. § 1983 action was filed in the federal district court just prior to the perfection of the state court appeal. Holloway, Humble, Sterling and the trustee sought a declaratory judgment that the state court judgment was void for lack of due process and a permanent injunction

against the defendants from taking any further action in the state court case or attempting to collect on the state court judgment, as well as compensatory and punitive damages, among other relief. These plaintiffs alleged that the Brownings, their attorneys and others had conspired with Judge Walker to steal the plaintiffs' assets through the conduct of a rigged trial. After several years of discovery, all defendants filed motions for summary judgment on the grounds that the plaintiffs failed to state a cause of action under 42 U.S.C. § 1983 and that the evidence failed to show an issue of fact regarding their alleged involvement in a conspiracy. The district court granted Respondent Ayres' motion with respect to procedural due process claims but held that the plaintiffs had stated claims of substantive due process that would not be dismissed. (Pet. App. A-39). The district court also held that it did not have subject matter jurisdiction to review the state court judgment, based on this Court's decision in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983) (Pet. App. A-36-38). On reconsideration, the district court agreed that the claims dealt with procedural due process. It granted all the motions for summary judgment, dismissing plaintiffs' claims, based on this Court's decisions in *Parratt v. Taylor,* 451 U.S. 527 (1981), and *Hudson v. Palmer,* 468 U.S. 517 (1984). (Pet. App. A-17).[2]

Holloway appealed to the Fifth Circuit Court of Appeals, which affirmed the federal district court's grant of summary judgment, holding that under *Parratt* and *Hudson,* the appellants were not deprived of property without due process. (A-16.) *Holloway v. Walker,* 784 F.2d 1287, *rehearing denied,* 790 F.2d 1170 (5th Cir. 1986). The Petition for

[2]At the time Ayres' Motion for Summary Judgment was granted, on April 18, 1985, the district court had already granted the Brownings' Motion for Summary Judgment on March 28, 1985. The court found that the Plaintiff had not produced sufficient evidence of conspiratorial agreement or conduct by the Brownings "after years of discovery."

Rehearing was denied in a Fifth Circuit opinion filed May 30, 1986. (A-60.). The Petition for Writ of Certiorari followed.

SUMMARY OF THE ARGUMENT

This Court should not grant the writ in this case for several reasons. The lower federal courts had no subject matter jurisdiction over this case in the first place, inasmuch as Petitioner's constitutional allegations are inextricably intertwined with the legal determinations of a state court and would necessarily require those federal courts to review that state judgment, which they may not do. This lack of subject-matter jurisdiction alone precludes any need for this Court to hear this case.

Moreover, the Fifth Circuit correctly applied this Court's opinions in *Parratt v. Taylor,* 451 U.S. 527 (1981), and *Hudson v. Palmer,* 468 U.S. 517 (1984), in granting summary judgment to Respondents. All the elements required for application of the *Parratt-Hudson* rule are present in this case. The decision here does not conflict with this Court's decision in *Aetna Life Insurance Co. v. Lavoie,* 106 S.Ct. 1580 (1986), which involved a direct appeal to this Court of a state judgment on due process grounds and included no issues raised by the *Parratt-Hudson* rule. Cases from other circuits, which Petitioner claims conflict with the Fifth Circuit opinion in this case, are clear contraventions of the holdings of *Parratt* and *Hudson* themselves. Thus, this Court has no need to grant the Writ of Certiorari in this case.

REASONS FOR NOT GRANTING THE WRIT

I. THE LOWER FEDERAL COURTS HAD NO JURISDICTION IN THIS CASE BECAUSE PETITIONER'S CLAIMS REQUIRE REVIEW OF A STATE COURT DECISION.

While the Fifth Circuit's opinion in this case turns on due process in light of the *Parratt-Hudson* rule, the case presents a much more basic jurisdictional situation that precludes any need for review by this Court. Holloway's claims in this case would require the lower federal courts to review the state court's legal determinations in the original state court action, which they have no jurisdiction to do.[3]

Lower federal courts possess no power whatever to sit in direct review of state court decisions. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482 n. 16 (1983); *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970). They have no jurisdiction over challenges to state court decisions in particular cases arising out of judicial proceedings, even if those challenges allege that the state court's action was unconstitutional. *Feldman,* 460 U.S. at 486. One who is aggrieved by a state court's decision allegedly violating a federal right may seek vindication of this federal right in the state appellate courts and ultimately in this Court, if necessary. *Atlantic Coast Line,* 398 U.S. at 296. Federal review of such state court decisions may be had only in this Court. *Feldman,* 460 U.S. at 486; *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923).

In *Feldman,* this Court set out its test for determining when the federal court is being asked to review a state court decision:

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[3]Although this issue was before the Fifth Circuit, that Court chose to discuss only the *Parratt-Hudson* rule in its opinion. However, the Fifth Circuit's denial of relief to Holloway in his related habeas corpus proceeding was based on this point. The Court held, "The inferior courts of the United States lack jurisdiction to test Petitioner's claim that the challenged state judgments are constitutionally invalid." (Appendix to Brief of Respondents Browning Interests and Ayres, page A-2.)

> If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision. This the district court may not do.

460 U.S. at 482 n. 16.

In his Petition for Writ of Certiorari, Petitioner states that the question here is "whether the harms [Judge Walker] visited upon Petitioner were brought about through his conduct of a trial, his entry of an award of damages, his imposition of receiverships and constructive trusts, and his rendering of a judgment n.o.v. ..." (Petition at 14). The Complaint in this case is threaded with allegations that Judge Walker consistently ruled against Petitioner on important evidentiary matters, made legally erroneous comments, took actions with no valid reason, allowed irrelevant questions that were highly prejudicial to Petitioner, made statements intended to prejudice Petitioner in the eyes of the jury, granted all the opposition's special issues and overruled all Petitioner's objections to them, and that adverse rulings as a whole amounted to an instructed verdict and deprived Petitioner of a meritorious defense. (R. Vol. 19, "A", pages 35-40). The federal district court noted that "virtually all of [the trial improprieties alleged in this suit], including the allegations of bias, are among the 211 points of error urged on appeal from the state court trial," concluding that the acts allegedly "evidencing and causing the deprivation are, for the most part, errors of law on appeal." (Pet. App. A-30.)

Petitioner apparently wishes to argue that the entry of a judgment n.o.v. by Judge Walker, for example, is evidence of

his participation in a conspiracy to deprive Petitioner of his property.[4] The issue before the federal court would be whether the judgment was justified based on the facts and law before Judge Walker. To claim that this act, and the others complained of, evidence a deprivation of property without due process is to inextricably intertwine the constitutional claims with the state court's decision in a judicial proceeding. In essence, the district court is being asked to review the state court judgment. As in *Feldman*, this review is impermissible. The district court had no jurisdiction. *Feldman*, 460 U.S. at 486.

This Court has applied the *Feldman* ruling to a § 1983 action including a claim of unfair trial in vacating and remanding for reconsideration in light of *Feldman* the Fifth Circuit decision in *State Bar of Texas v. Howell*, 674 F.2d 1027 (5th Cir. 1982), *vacated and remanded*, 460 U.S. 1065 (1983), *opinion on remand*, 710 F.2d 1075 (5th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984). The plaintiff in that case, an attorney, brought a § 1983 action complaining that a disciplinary proceeding brought against him in state court violated the United States Constitution and seeking declaratory and injunctive relief. Among other things, he claimed that he was deprived of his right to a jury trial and his right to a fundamentally fair trial in the state court proceeding. On remand after this Court vacated the original reversal of the district court's dismissal, the Fifth Circuit analyzed the plaintiff's claims in light of *Feldman*, as required by this Court, and found that these claims were

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[4]The judgment in the state court case was not in fact a judgment n.o.v. The judgment was based on jury findings favorable to the plaintiffs in that case. The fact that the jury did not find for the plaintiffs on two jury issues on which they had the burden of proof is not an affirmative jury finding favorable to the defendants. Multiple findings favorable to the state court plaintiffs supported the judgment.

"inextricably intertwined with the state court's decision in a judicial proceeding." 710 F.2d at 1077. With respect to all the plaintiff's claims except his attack on the constitutionality of the state bar disciplinary scheme, the Fifth Circuit said, "[Plaintiff] has done nothing more than ask the district court to sit as an appellate court and review the state court judgment." *Id.*

If Petitioner successfully invokes jurisdiction of the federal district court here, then any disgruntled, losing litigant is offered the possibility of avoiding the effect of a judgment against him in state court, even after he has directly attacked the state court's judgment all the way through the state court system and has been turned away from the doors of this Court. All he need do is claim the state judge conspired with the winning litigants to deprive him of his property without due process of law. He then can obtain an additional review of his lost case in the guise of examining the propriety and merits of the state judge's actions and decisions. Such is not the intention of 42 U.S.C. § 1983. The district court had no subject matter jurisdiction over this case, so this Court has no need to grant the Writ of Certiorari to hear the Fourteenth Amendment due process issue raised by Petitioner.

II. THE FIFTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISIONS IN *PARRATT V. TAYLOR* AND *HUDSON V. PALMER* IN THIS CASE.

This Court's decisions in *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984), refined the concept of what constitutes a sufficient allegation of a violation of the Fourteenth Amendment Due Process Clause. *Parratt* established that if a deprivation of property was not due to an established state procedure but was

caused by the random and unauthorized act of a state agent, making predeprivation process impracticable because the state cannot know when such deprivations will occur, and if postdeprivation remedies provided by the state are adequate, the person has not been deprived of property without due process of law. Although *Parratt* dealt with a negligent deprivation, the *Hudson* decision extended the *Parratt* rule to unauthorized intentional deprivations of property by state employees acting under color of law.[5] 104 S.Ct. at 3204.

Petitioner apparently claims *Parratt-Hudson* is inapplicable here because Judge Walker could have provided adequate predeprivation process but allegedly did not. On the contrary, this case is closely analogous to *Hudson*. It presents a claim for procedural due process violations due to the alleged *intentional* misconduct of a state agent, in this case a state judge. As in *Parratt* and *Hudson*, the state could not possibly know when such misconduct was likely to occur. The alleged deprivation was not due to the operation of an established state procedure; rather the entire case revolves around allegations that the state judge did not follow state procedures. The availability of the appellate system offered Petitioner process that could restore all his property to him before he was finally deprived of it.

Petitioner apparently argues that because the state acts through its agents and employees, an allegation that a state judge has abused his power is automatically sufficient to allege a due process violation in a 42 U.S.C. § 1983 action. This argument confuses the inquiries required by § 1983.

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[5]This Court has recently held that the due process clause is not implicated by the merely negligent act of an official causing unintended loss of or injury to life, liberty or property, overruling *Parratt* in that narrow context. *Daniels v. Williams*, 106 S.Ct. 662, 663 (1986). The present case involves allegations of intentional deprivation of property, so the general rule formulated in *Parratt*, as extended in *Hudson*, is applicable.

In citing this Court to *Dennis v. Sparks*, 449 U.S. 24 (1980), which involved only the question of whether private persons who allegedly conspired with a state judge acted under color of state law,[6] Petitioner apparently equates the finding that an action was "under color of state law" in a § 1983 action with a determination that the alleged deprivation was without due process. Whether the complained-of act was action "under color of law" is an entirely different question from that of whether there was a deprivation without due process of law; these issues are two separate, essential elements of § 1983. Indeed, the Court in *Parratt* noted the dual nature of the inquiry:

> Since this Court's decision in *Monroe v. Pape*, [365 U.S. 167 (1961)], it can no longer be questioned that the alleged conduct by the petitioners in this case satisfies the "under color of law" requirement. Petitioners were, after all, state employees in positions of considerable authority. They do not seriously contend otherwise. Our inquiry, therefore, must turn to the second requirement — whether respondent has been deprived of any right, privilege or immunity secured by the Constitution or laws of the United States.

451 U.S. at 535-36.

Likewise inapposite is Petitioner's citation of *Ex parte Virginia*, 100 U.S. 339 (1880), dealing with Congress' power to impose criminal penalties on state government officials

[6]Traditionally, this Court does not undertake to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *Aetna Life Ins. Co. v. Lavoie*, 106 S.Ct. 1580, 1588 n.4 (1986). Since the question before the Court in *Dennis* involved only the "under color of state law" requirement, Petitioner's claim that the Court impliedly negated the applicability of *Parratt-Hudson* to a alleged conspiracy with a state judge, in a case that entirely predated *Parratt*, is unwarranted.

for discriminating on the basis of race, and *Home Telephone & Telegraph Co. v. Los Angeles,* 227 U.S. 278 (1913), dealing with the question of whether an action had to be found to comply with a state constitutional provision analogous to the Fourteenth Amendment before it could be challenged on Fourteenth Amendment grounds. Neither case has any relevance to the determination of what constitutes due process for § 1983 purposes. The opinion below does not conflict with these cases.

As this Court stated clearly in *Parratt,* it is of no consequence that the individual state employee who intends to effect the alleged deprivation can, of course, foresee it. "The controlling inquiry is solely whether the State is in a position to provide for predeprivation process." 104 S.Ct. at 3204. The fact that the person who allegedly intentionally effects the deprivation is a state actor for the purposes of the "under color of state law" inquiry has no bearing on the issue of whether his act was "random and unauthorized" for purposes of the application of the *Parratt-Hudson* rule.

Petitioner seizes upon the requirement that the deprivation be "unauthorized" in order for the *Parratt-Hudson* rule to be applicable and claims that because the alleged state actor, in this case a judge, was "authorized" by the state to perform the functions of a judge, such as entering judgments and awarding damages, he was "authorized" to do the alleged acts in this case, i.e., enter judgment for one side pursuant to conspiracy instead of the merits of the case.[7]

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[7]Petitioner also claims that *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982), should apply here instead of *Parratt-Hudson* because the alleged deprivation was due to "an established state procedure," i.e., a trial. This Court made clear the meaning of "an established state procedure" in *Logan. Logan* dealt with deprivation of property pursuant to the operation of an inherently inadequate state procedure: Having mistakenly

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This interpretation ignores the clear purpose of the *Parratt-Hudson* requirement that the act be "random and unauthorized": To determine whether the state could possibly know when such deprivations will occur so as to practicably provide a predeprivation remedy. As this Court noted in *Hudson:*

> The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent.

104 S.Ct. at 3203.

The fact that a state "authorized" a judge to deprive a litigant of property by entering a judgment would not enable the state to predict an abuse of this power and provide a predeprivation remedy. The fact that a judge's act must have been a "judicial" one in order for him to claim judicial immunity, *Dennis v. Sparks,* 449 U.S. 24, 29, (1980), is obviously irrelevant to this inquiry.

The adequacy of the state remedies is not determined by the fact that they may give different relief or relief less in

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failed to hear an employment discrimination complaint within the statutory time period, an Illinois commission lost jurisdiction under the statute, depriving the complainant of his cause of action without due process. This Court distinguished *Parratt* by stating that in *Logan* it was the state system itself, an established state procedure, that destroyed Logan's property interest by operation of law. *Id.* at 435-36. Logan was challenging the state procedure itself, not the error by state officials that triggered the deprivation under the procedure. *Id.* The plaintiff in the present case, Petitioner, was not challenging the state procedure but the judge's allegedly illegal acts.

amount than that the plaintiff could receive in a § 1983 action. *See Hudson*, 104 S.Ct. at 3204. Nor is such adequacy affected by the plaintiff's failure to utilize these remedies or to make effective use of them. In the present case, Petitioner utilized his appeal rights and lost his case because the Texas courts viewed his simultaneous pursuit in federal court of a declaration that the state judgment was void, on grounds not asserted in the state court, to be an election of the federal remedy and a trifling with the state courts. *Humble Exploration Co. v. Browning*, 677 S.W.2d 111 (Tex. App. — Dallas 1984), *opinion on rehearing in banc*, 690 S.W.2d 321 (Tex. App. — Dallas 1985, writ ref'd n.r.e.), *cert. denied*, 106 S.Ct. 1376 (1985). Petitioner now claims that he was denied access to the state's appellate system and that the state remedy was not "meaningfully" available to him. (Petition at 20 n. 31.)

The availability of state process to correct alleged deprivations must not be confused with Petitioner's success in pursuing them. That a plaintiff by his own negligent or intentional acts waives or loses his remedy does not create a § 1983 cause of action. In *Parratt*, the prisoner-plaintiff failed to use state procedures in existence at the time of his loss. This Court's dismissal of the case was based on the availability of the state procedures at the time, not the plaintiff's success in pursuing them. 451 U.S. at 543.

This case presented to the Fifth Circuit an eminently suitable situation for application of the *Parratt-Hudson* rule. Because that rule was properly applied in this case, this Court should not grant the writ.

III. THE FIFTH CIRCUIT'S DECISION DOES NOT CONTRADICT THIS COURT'S HOLDING IN *AETNA LIFE INSURANCE CO. V. LAVOIE* AND DOES NOT TRIVIALIZE THE RIGHT TO A FAIR TRIAL.

Petitioner claims that the Fifth Circuit's holding "trivializes" the right to a fair trial, arguing that it contradicts this Court's recent decision in *Aetna Life Insurance Co. v. Lavoie,* 106 S.Ct. 1580 (1986), and earlier cases. On the contrary, the Fifth Circuit's holding in no way detracts from this right but merely follows *Parratt* and *Hudson* in analyzing what the state must do to provide all the process necessary to secure this right to its citizens. Unlike this case, *Lavoie* was not a § 1983 case but a direct attack on an Alabama Supreme Court decision, which the appellants there sought to overturn. This Court vacated the judgment and remanded for further proceedings because the state supreme court justice who cast the deciding vote was plaintiff in two other lawsuits involving the issue in *Lavoie* and his decision directly enhanced the legal status and the settlement value of his own case. 106 S.Ct. at 1586. *Lavoie* in no way presented any issue relating to the availability and adequacy of state procedures to safeguard the plaintiff's rights, in the *Parratt-Hudson* sense.

Petitioner Holloway's claims were in the *Lavoie* posture of a direct review when he appealed the state court judgment to the Texas appellate courts and then petitioned this Court for Writ of Certiorari. In the state appellate courts he argued that the state court erred in denying his motion to recuse Judge Walker for bias and conduct of alleged *ex parte* meetings, claiming deprivation of procedural due process. If the denial of recusal had been found erroneous, he would

have been entitled to a new trial and a different judge. In seeking direct review in this Court, Petitioner also raised his constitutional claim that he was denied a fair trial in state court.[8] This Court denied the Petition. The context of the consideration of these claims of unfair trial is the same as the review accorded in *Lavoie, Ward v. Village of Monroeville,* 409 U.S. 57 (1972), *In re Murchison,* 349 U.S. 133 (1955), and *Tumey v. Ohio,* 273 U.S. 510 (1927), in that all of these cases raised the issue on direct review. These decisions shape the right to a fair trial, but they do not determine whether a cause of action for a procedural due process violation is stated under 42 U.S.C. § 1983 because the state has not provided adequate process, the *Parratt-Hudson* inquiry.[9]

Petitioner claims much wider sweep for *Lavoie* than it claims by its own terms. Under Petitioner's interpretation, a state court decision that is reversed on appeal because it is found that the trial judge should have been recused would present a § 1983 cause of action. This expansion of § 1983

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[8]One of the questions posed to this Court by Petitioner in his Petition for Writ of Certiorari on direct review of the state court judgment was the following:

> Were Petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the federal Constitution denied when a Texas Court of Appeals dismissed their pending appeal from a judgment rendered against them in the Court of first instance by a biased and corrupted judge following an unfair trial, on the ground that Petitioners forfeited their appeal by unsuccessfully collaterally attacking the validity of that judgment when Respondents sued to enforce it in federal court?

Petition for Writ of Certiorari, *Humble Exploration, Inc. v. Browning,* No. 85-1182.

[9]Petitioner also appears to claim that the right to an impartial tribunal is substantive due process. This Court has always considered the requirement of judicial impartiality to be a matter of procedural due process. In

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cannot have been intended by this Court to be read into *Lavoie*, which after all is not even a § 1983 case. The Fifth Circuit's opinion establishes that allegations of unfair trial against a trial judge must be resolved in direct review. *Lavoie* is not inconsistent with this opinion.

IV. THE FIFTH CIRCUIT CORRECTLY FOLLOWED THE *PARRATT* AND *HUDSON* CASES INSTEAD OF THE HOLDINGS OF OTHER CIRCUITS, AND ANY DIFFERENCES BETWEEN THE CIRCUIT OPINIONS DO NOT WARRANT A GRANT OF THE WRIT OF CERTIORARI IN THIS CASE.

Petitioner cites two cases from other circuits that he alleges conflict with the Fifth Circuit Court of Appeals' decision in this case. In fact, the holdings of these cases clearly conflict with *Parratt* and *Hudson* themselves in the senses in which Petitioner seeks to use them. The fact that two other circuits have misapplied Supreme Court precedent creates no need for this Court to hear a case in which the lower court has correctly applied the same precedent.

The Fifth Circuit correctly noted that the points in *Patterson v. Coughlin*, 761 F.2d 886 (2nd Cir. 1985), *cert. denied*,

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Marshall v. Jerrico, Inc., 446 U.S. 238, 242-43 (1980), the Court discussed the need for a neutral tribunal:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of *procedural* due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process.

(emphasis added). *See Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 702 (1948) (characterizing Court's decision in *Tumey* as finding a violation of procedural due process).

106 S.Ct. 879 (1986), and *Bretz v. Kelman,* 773 F.2d 1026 (9th Cir. 1985), on which the petitioner relies, conflict with the holdings of *Parratt* and *Hudson* themselves. *Patterson's* holding that whether conduct of a state official was "random" or "unauthorized" for *Parratt-Hudson* purposes must be "viewed from the position of one who possesses the state-delegated authority to grant a hearing when circumstances and the Constitution so require" is clearly contradicted by the United States Supreme Court's express rejection of a similar argument in *Hudson,* where the respondent contended that because an agent of the state who intended to deprive a person of his property *can* provide predeprivation process, then he must do so as a matter of due process. This Court in *Hudson* stated that this argument reflected a fundamental misunderstanding of *Parratt* and that whether an individual employee himself was able to foresee a deprivation was of no consequence; the controlling inquiry was solely whether "the state is in a position to provide for predeprivation process." 104 S.Ct. at 3204. Since in *Hudson* it was the state agent himself who both had the opportunity to provide predeprivation process and who intended to deprive the respondent of his property, the decision in *Hudson* squarely contradicts the Second Circuit's analysis in *Patterson.*

As for *Bretz,* none of the essential holdings of that case, on which Petitioner here relies, are supported by *Parratt, Hudson* or *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1984). The Ninth Circuit's conclusion that a conspiracy cannot be a random act uses semantics to dodge *Hudson's* clear holding that an intentional deprivation of property is subject to the rule enunciated in *Parratt*. A conspiracy is, of course, intentional.

This Court recently denied certiorari in a Sixth Circuit case that rejected similar reasoning. In *National Communication*

Systems, Inc. v. Michigan Public Service Commission, 789 F.2d 370 (6th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3208, 3235 (Oct. 6, 1986), the plaintiffs argued that allegations of conspiratorial acts on the part of public officials, whose duty it was to see that plaintiffs were not denied due process, were different from the random and unauthorized acts of misconduct that require a showing of the inadequacy of state remedies under *Parratt*. 789 F.2d at 372. The Sixth Circuit stated that the reasoning of *Parratt* appears to extend to all § 1983 cases claiming a procedural due process injury to a property interest. *Id.* at 372-73.

The Ninth Circuit's conclusion in *Bretz* that *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1984), extends to an illegal conspiracy case is equally mystifying. *Logan* did not involve "abuse of an established state procedure," as the *Bretz* court stated, but the operation of an inherently inadequate state procedure. The procedure itself deprived the claimant of his rights if the employment commission failed to act within the statutory period for any reason. The claimant challenged the system, not the failure of the Commission to act.

Finally, the *Bretz* court's holding that *Parratt* and *Hudson* apply only to minor deprivations is completely unsupported by these cases. Such a limitation would divide the cases' focus: The court would have to decide not only "Did the plaintiff adequately allege a deprivation of his property without due process of law?" but also "Was the property interest of which the plaintiff was deprived sufficiently insignificant?" The *Parratt* and *Hudson* opinions nowhere indicate that the Court followed such an analysis.

Where the decisions of other circuits are clearly unsupported by the United States Supreme Court decisions on

which they purport to be based, the claim by Petitioner that they conflict with the decision of the court below in this case presents no compelling reason for this Court to hear this case. The Fifth Circuit correctly applied the law in this case. The Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons set out herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. Brent Cooper, counsel of record for Respondent G. H. Kelsoe, Jr. and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of Respondent Kelsoe's Response to Petition for Writ of Certiorari on all parties required to be served, by depositing three copies of Respondent Kelsoe's Response to Petition for Writ of Certiorari in the United States mail, on this _____ day of November, 1986, with first class postage prepaid, addressed to the listed counsel of record at the addresses indicated.

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No. 86-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAT S. HOLLOWAY,

Petitioner,

v.

JUDGE DEE BROWN WALKER ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF

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November 15, 1986

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ARGUMENT

The court of appeals held that a conspiracy to produce an unfair trial cannot violate "federal constitutional guarantees" so long as the "state system *as a whole* provides due process of law." (A65) (emphasis added). Respondents concede that the court below so held, and further concede that this holding conflicts with recent holdings of at least two other circuits. Yet respondents urge that the resulting question presented by this petition is not worthy of certiorari because an alternative theory supports the Fifth Circuit's decision; because the facts do not really show any conspiracy; or because *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U.S. 278 (1913), with which the decision below also conflicts, no longer means what it meant before *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 105 S.Ct. 3108 (1985). Respondents are wrong on all three counts. "Constitutional law is . . . continuously evolving,"[1] as respondents say, but surely it is for this Court to say when its precedents have been "overruled."[2]

I. RESPONDENTS' *ROOKER/FELDMAN* ARGUMENT IS AN IRRELEVANT DISTRACTION.

The briefs in opposition contend that the questions presented by the petition are "academic"[3] and may be avoided altogether because the Fifth Circuit should have ordered dismissal of petitioner's § 1983 complaint for lack of subject matter jurisdiction under *District of Columbia Court of Appeals* v. *Feldman*,

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[1] Brief in Opposition of Respondent Wright ("Wright Br.") at 16.

[2] *Id.*

[3] Brief in Opposition of the Browning Interests and R. Jack Ayres ("Browning Br.") at 21.

460 U.S. 462 (1983), and *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923). Respondents are confused — and mistaken.[4]

Obviously, if petitioner were to ask the courts below on remand to render "a declaratory judgment that the state court judgment was void,"[5] or to vacate, set aside, or reverse that judgment, or to inquire "whether the judgment was justified based on the facts and law before Judge Walker,"[6] *Rooker/Feldman* would stand in the way. Since such relief is not available, § 1983 actions such as this and the action in *Dennis* v. *Sparks*, 449 U.S. 24 (1980), provide no route for circumventing the *Rooker/Feldman* limit on the original jurisdiction of the federal district courts, despite respondents' concern.[7] To avoid just such circumvention, the district court in this case substantially narrowed the grounds on which petitioner could proceed, holding that petitioner could not obtain a reversal of Judge Walker's rulings, or even seek to prove conspiracy merely by showing those rulings to be in error.[8] Having thus pared down petitioner's complaint, the district court "accept[ed]"

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[4] Respondents admit that the district court rejected their argument and found that it had jurisdiction to hear part of petitioner's complaint, and that the Fifth Circuit declined to address their *Rooker/Feldman* argument. Brief in Opposition of Respondent Kelsoe ("Kelsoe Br.") at 9 n.3; Browning Br. at 11. Nevertheless, respondents make strange claims that this issue was somehow decided in their favor by the district court below, *see* Wright Br. at 8, 9; Kelsoe Br. at 7, and even by the Fifth Circuit — the latter, supposedly, while the Fifth Circuit was making a ruling in a different case. *See* Kelsoe Br. at 9 n.3; Browning Br. at 11-12. This is sheer fantasy.

[5] Browning Br. at 8.

[6] Kelsoe Br. at 11.

[7] See, e.g., Kelsoe Br. at 12.

[8] The district court stated that *Rooker/Feldman* required it to focus exclusively on petitioner's claim "that an unfair trial was received *without regard to the validity* of Judge Walker's legal rulings and the outcome of the trial." (A38) (original emphasis; footnote omitted). Accordingly, the district court declined "to examine Judge Walker's rulings to determine which were harmless and which were reversible, causing damage." *Id.*

petitioner's argument that "'the merits of the state court proceedings are not at issue in this case' and that 'a substantive appellate review of the correctness of various rulings made by Judge Walker' will not be required." (A37).[9]

What remained, the district court observed (A37-38), was the prospect of proving, as in *Carey* v. *Piphus*, 435 U.S. 247 (1978), that the very denial of procedural fairness, apart from the substantive outcome, caused recoverable harm on these facts. If petitioner is able to show on remand that there was indeed a conspiracy of the sort alleged, and that the sham trial produced by that conspiracy caused harm apart from the judgment eventually entered, then, but for the *Parratt/Hudson*[10] theory of the courts below, petitioner would be given that opportunity.[11] The district court so held, and the decision of the Fifth Circuit was to the same effect. It was only *Parratt* and *Hudson* that blocked petitioner's path.

The decision below therefore cannot be supported on the alternative theory of no original jurisdiction. That theory would have required dismissing the complaint altogether, and would have prevented the courts below from ever reaching the *Parratt/Hudson* issue. Indeed, under that theory, this Court's post-*Rooker* decision in *Dennis* v. *Sparks* would have constituted

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[9] The district court specifically ruled that there was sufficient evidence extrinsic to the state courtroom proceedings to warrant a trial on the conspiracy claim — for example, evidence that Judge Walker had conducted ex parte meetings with respondents at which he had "announced the decision to submit jury issues on 'our' theory of the case" (A35).

[10] *Parratt* v. *Taylor*, 451 U.S. 527 (1981); *Hudson* v. *Palmer*, 468 U.S. 517 (1984).

[11] *See Carey, supra*, at 258-59, 264; *Memphis Community School Dist.* v. *Stachura*, 106 S.Ct. 2537, 2544 n.11 (1986). *See also id.* at 2546, 2547 (Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ., concurring) ("the violation of a constitutional right, in proper cases, may itself constitute a compensable injury" where damages are "reasonably quantifiable" and not based solely on the "inherent value of the right violated").

an impermissible exercise of jurisdiction. For there, as here, the federal plaintiffs sought damages for a conspiracy between private parties and a state judge to cause injury by "subverting the judicial process," 449 U.S. at 32. The conspiracy-induced injunction in *Dennis* was reviewed and "dissolved by a [state] appellate court" before the federal § 1983 action was even filed. *Id.* at 25. If respondents are correct, then the federal district court would have been without jurisdiction to entertain the anti-conspiracy suit in *Dennis* because that would have amounted to reviewing the state court judgment issuing the injunction. For this reason, the Fifth Circuit would have been obliged to direct dismissal of the *Dennis* complaint, and this Court would have had to so order.[12] Instead, this Court held that relief would lie.[13] If cases like *Dennis* v. *Sparks* are to be expelled from the lower federal courts on the ground that, despite *Carey* v. *Piphus*, someone who is denied a fair proceeding cannot seek damages caused by that denial of *fairness* as such, but must content himself with having the *outcome* of the proceeding reviewed and perhaps reversed, then that result should be decreed by this Court, after full briefing and argument — not by a circuit court, in an opinion that does not even address the question.[14]

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[12] *Cf. Bender* v. *Williamsport Area School District*, 106 S.Ct. 1326, 1331 (1986).

[13] It is immaterial that the only issue specifically addressed in *Dennis* was the "color of law" issue; if respondents were correct in their view of *Rooker/Feldman*, the problem would be jurisdictional.

[14] In any event, the Fifth Circuit's action in proceeding to reach and decide the *Parratt/Hudson* question was not made the basis for a cross-petition for certiorari by respondents, and therefore the *Rooker/Feldman* issue is not before this Court. The principle that the Court may affirm on any available ground is immaterial; if the district court indeed lacked subject matter jurisdiction, the Fifth Circuit's judgment affirming the district court's summary judgment in favor of respondents on the *Parratt/Hudson* question would have to be *vacated* on jurisdictional grounds, not affirmed.

II. RESPONDENTS' EFFORTS TO MAKE THIS CASE SEEM FACTUALLY OR PROCEDURALLY CONVOLUTED ARE TOTALLY EXTRANEOUS TO THE QUESTION PRESENTED.

When the question presented by a petition concerns access to the federal courts under § 1983 to vindicate the right to uncorrupted judicial process, this Court has not allowed its attention to be distracted by discussion of either the supposed merits of the underlying claim or the record of prior litigation on that claim. *See, e.g., Tower* v. *Glover,* 467 U.S. 914, 923 (1984). And the factual and procedural wrinkles elaborated by respondents here have nothing at all to do with whether the decision below is worthy of review and calls for reversal. Respondents' excuse for dumping all this material on the Court — replete with aspersions on petitioner's "latest wife, herself a convicted felon"[15] — is that the district court granted summary judgment for respondents rather than dismissing on the pleadings; "Holloway's pleadings," respondents say, "are not assumed to be true in an appeal from a summary judgment."[16]

That completely misses the point. The Fifth Circuit held — as a glance at its opinion will show (A8-16), and as the briefs in opposition expressly concede — that, under *Parratt* and *Hudson,* "the conduct between Judge Walker and the other defendants alleged" by Holloway "*failed to state a cause of action* under 42 U.S.C. § 1983 based on a denial of due process since process still existed in the form of an appeal."[17] Whether there was in fact a conspiracy, or what other proceedings transpired, is utterly immaterial to this holding. Thus there is

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[15] Browning Br. at 6 n.11.

[16] *Id.* at 2 n.3.

[17] Browning Br. at 10-11; Wright Br. at 8-9 (emphasis added); *see also* Kelsoe Br. at 7.

no relevant factual or procedural dispute bearing on the holding below that petitioner asks this Court to review.[18]

III. RESPONDENTS DO NOTHING TO RECONCILE THE JUDGMENT BELOW WITH A CENTURY OF FOURTEENTH AMENDMENT PRECEDENT AND WITH THIS COURT'S OWN NARROW READING OF *PARRATT* AND *HUDSON*.

Respondents repeat the Fifth Circuit's error of viewing Fourteenth Amendment jurisprudence as having begun with *Parratt/Hudson*, and therefore fail to explain how the holding below can possibly be squared with the entire corpus of due process and § 1983 case law. Respondent Kelsoe, for example, is perplexed by petitioner's reliance on *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U.S. 278 (1913), since that case "has [no] relevance to the determination of what constitutes due process for § 1983 purposes."[19] *Home Telephone's*

[18] The Browning brief mysteriously accuses petitioner of "repeatedly and erroneously suggest[ing]" that the Fifth Circuit's recognition of Judge Walker's immunity "is this current appeal." Browning Br. at 10 n.15. Petitioner suggests no such thing. Indeed, petitioner accepts and relies on the Fifth Circuit's judicial immunity ruling. See Petition at 6-7 & n.10, 14-15. Nor does this petition for certiorari have anything to do with the petition denied in *Humble Exploration Co.* v. *Browning*, 106 S.Ct. 1376 (1986). Although respondents quote parts of that petition dealing with due process and the Texas rule of election of remedies in order to make the preposterous suggestion that this Court has already decided the issue tendered to it here, see Browning Br. at 16-17 & n.18; Wright Br. at 7; Kelsoe Br. at 19 & n.8, respondents' own recitation of the procedural history of the prior petition, see Browning Br. at 7 n.13, and their quotation of the precise question presented therein, Wright Br. at 7 n.3; Browning Br. at 16; Kelsoe Br. at 19 n.8, make clear that the issues posed therein were entirely distinct — and indeed that the judgment challenged therein might well have been thought to rest on an adequate and independent state procedural ground.

[19] Kelsoe Br. at 15.

relevance, of course, is that it established the fundamental rule that a due process violation may be complete when a state agent abuses his power, notwithstanding the availability of state avenues for redress. Respondents, like the Fifth Circuit, seem not to appreciate the fact that *Parratt/Hudson* is but a narrow exception to that rule.[20]

The briefs in opposition effectively concede the need for plenary review by admitting that the Fifth Circuit's extraordinarily broad reading of *Parratt* and *Hudson* is in conflict with that adopted by other circuits.[21] Respondents deem this conflict unworthy of this Court's attention on the suppositions that the other circuits are wrong and that *Parratt/Hudson* compels the position taken by the court below. But respondents' own analysis of *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 105 S.Ct. 3108 (1985),[22] plainly shows that petitioner is correct in his far narrower reading of *Parratt* and *Hudson*. *Williamson County* held that a § 1983 claim that an uncompensated taking has occurred is "premature" until the landowner complaining of inverse condemnation "has used the

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[20] The brief of respondent Wright does not even mention *Home Telephone* or *Ex parte Virginia*, 100 U.S. 339 (1880), preferring instead, see Wright Br. at 19, to misread *Monell* v. *Dept. of Social Services*, 436 U.S. 658, 694 (1978), which dealt only with the question of whether a municipality may be *liable for damages* as a result of an agent's wrong that did not reflect any municipal "policy or custom." Nobody is seeking to hold Texas, or any Texas city or official, liable for damages in this case. Respondents Browning and Ayres seem to believe *Ex parte Virginia* is irrelevant because it is an old "habeas corpus case" dealing with "Negro . . . servitude," Browning Br. at 19-20. And they dismiss *Home Telephone*'s holding that even *unauthorized* abuse of state power violates Fourteenth Amendment due process as having been modified — seemingly, overruled — by this Court's reading of the Fifth Amendment Just Compensation Clause in *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 105 S.Ct. 3108 (1985)! See Browning Br. at 20.

[21] Browning Br. at 21; Wright Br. at 17-18; Kelsoe Br. at 20.

[22] See Browning Br. at 20.

[state-provided judicial] procedure and been denied just compensation." 105 S.Ct. at 3121. In finding this result "analogous to the Court's holding in *Parratt*," *id.*, this Court stressed the very point petitioner makes in his Petition at 19: there are some rights that simply are not violated unless and until the state refuses to provide a remedy. But not all procedural rights are of that character, and respondents offer literally nothing to support the stunning proposition — embraced by the judgment below — that the right to a fair trial is analogous to the right to just compensation in this respect.

If respondents were correct that the right to fair and impartial judicial process could be invoked only in this Court and only on direct review of a final state court judgment,[23] then it would follow that all § 1983 claims such as the one at bar and the one in *Dennis* v. *Sparks* would have to be dismissed for failure to state a claim, whatever the factual showing of conspiracy and deprivation.[24] More dramatically, respondents' theory would strip Congress of its remedial authority, under § 5 of the Fourteenth Amendment, to empower federal courts to redress

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[23] See Browning Br. at 15-17; Wright Br. at 15-16; Kelsoe Br. at 18.

[24] Respondents' reliance on *Tumey* v. *Ohio*, 273 U.S. 510 (1927), *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), and *In re Murchison*, 349 U.S. 133 (1955), for this proposition shows the fallacy of their reading of *Parratt/Hudson*. *See* Browning Br. at 14-15; Kelsoe Br. at 19. For if the Fifth Circuit and respondents were correct that a biased or otherwise corrupted state trial does not amount to a due process violation so long as the state provides an adequate post-deprivation remedy, then there would have been no due process violation in *Ward*, *Tumey or Murchison* — and hence no basis for this Court's appellate jurisdiction — since in each case the state provided an appellate remedy whose adequacy was never challenged. The fact that the *outcomes* of the state appeals in those cases did not satisfy the petitioners' wishes does not in any way suggest, much less prove, that those post-deprivation remedies were *procedurally* inadequate. In any event, as Justice Brennan wrote for the Court in *Ward*, a state trial cannot "be deemed constitutionally acceptable simply because the state eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." 409 U.S. at 61-62.

wrongs done under color of state law by those who conspire with state judges "to harass and injure individuals," *Mitchum* v. *Foster*, 407 U.S. 225, 240 (1972), so long as the state provides — as every state does — appellate review. How casually respondents, like the Fifth Circuit, overlook the Civil War and its aftermath.

Just last Term, this Court described the *Parratt/Hudson* line as distinguishing the commission of garden variety torts by state actors from "the sort of abusive government conduct that the Due Process Clause was designed to prevent." *Davidson* v. *Cannon*, 106 S.Ct. 668, 670 (1986). The court of appeals agreed that petitioner's complaint alleges just such abuse (A47), and the district court found that there was sufficient evidence, extrinsic to the state judgment and the rulings of the trial court (A37-38), to support the inference of a conspiracy between certain respondents and Judge Walker to harm petitioner (A35). Respondents have said nothing that changes *those* facts, or that justifies the decision below. The briefs in opposition thus do nothing to undermine petitioner's original submission that this case merits full briefing and argument, if not per curiam reversal.

Respectfully submitted,

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